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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 421

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY AND CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioners,

vs.

CITY OF SAINT PAUL, A MUNICIPAL CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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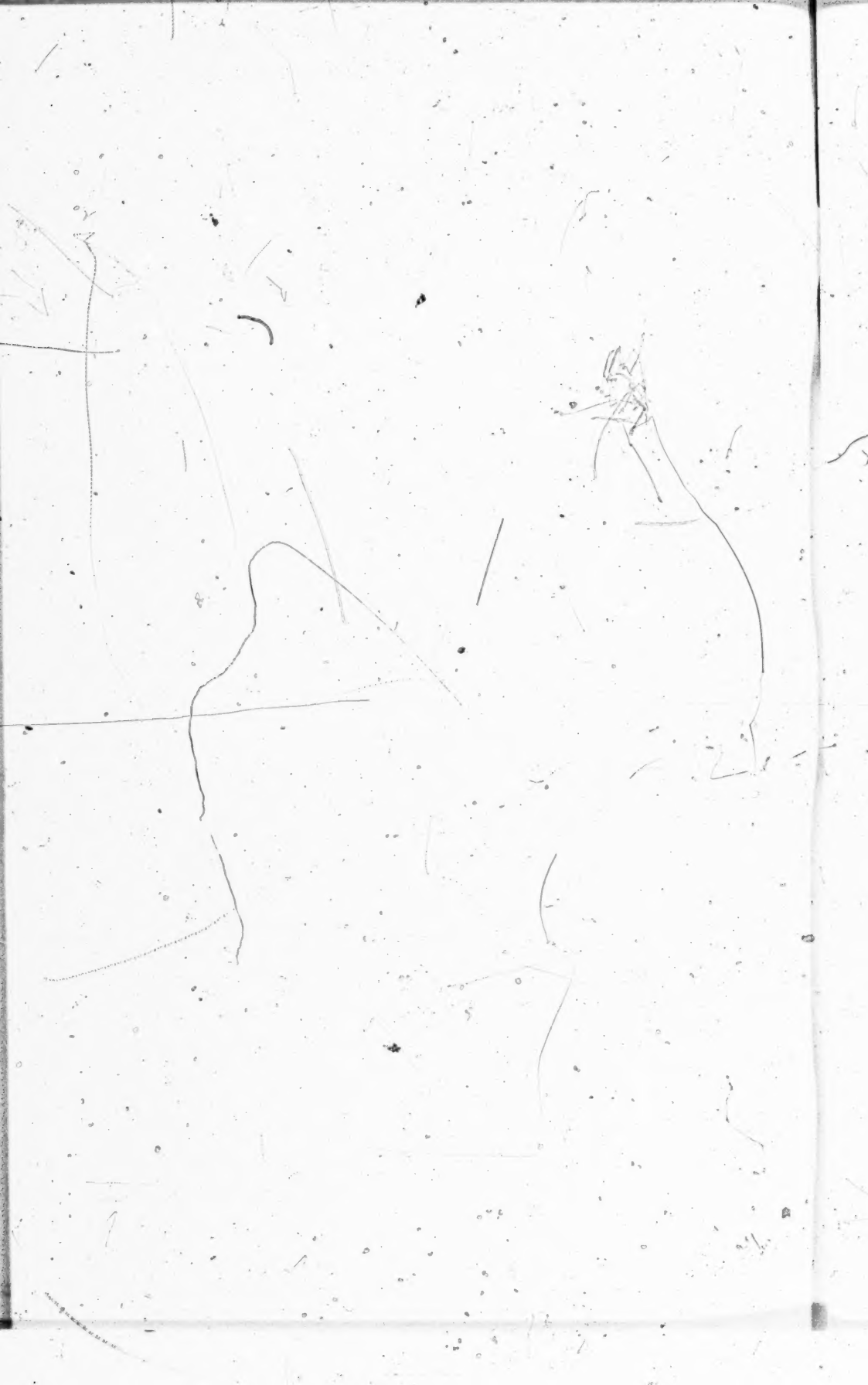

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CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY AND CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioners,

vs.

CITY OF SAINT PAUL, A MUNICIPAL CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit dated May 6, 1969, and respectfully show to the Court:

CITATIONS TO OPINIONS BELOW

The decision of the District Court in the form of Findings of Fact, Conclusions of Law and Order for Judgment is unreported; a copy is printed in Appendix B, infra, pages 30-37. The opinion of the Court of Appeals is printed in Appendix B, infra, pages 38-77; it has not yet appeared in the Federal Reporter. A supplemental opinion, denying rehearing, is printed in Appendix B, infra, page 78-82.

JURISDICTION

The judgment of the Court of Appeals was entered May 6, 1969. R. Vol. II, page 39, infra. Rehearing was denied on June 16, 1969. (R. Vol. II, p. 48); a supplemental opinion and order denying rehearing were entered July 2, 1969 (R. Vol. II, pp. 50-55, infra, pp. 78-82). Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1). The jurisdiction of the District Court was invoked both because of diversity of citizenship (plaintiffs being Wisconsin corporations headquartered in Illinois, and defendant a citizen of Minnesota) and because of the federal constitutional questions involved under the 5th and 14th Amendments (R. 2, 376).

QUESTIONS PRESENTED

1. (a) Whether a municipal ordinance which limits the height of construction on petitioners property to no higher than the ground level of adjacent property for the purpose of providing a scenic easement for the benefit and use of an adjoining city park creates such a deprivation of the practical use of petitioners' property as to constitute a taking, which, without adequate compensation, violates the 5th and 14th Amendments to the United States Constitution;

(b) Whether a decision upholding such an ordinance on the basis of reasonableness violates the 5th and 14th Amendments to the United States Constitution;

(c) Whether a decision upholding such an ordinance directly conflicts with the constitution of the state of Minnesota and decisions of the Minnesota Supreme Court.

2. Whether a finding of fact made by the District Court, that a municipal zoning ordinance bore no relationship to health, safety, morals or the general welfare, when made pursuant to Federal Rules of Civil Procedure 52(a) and the requirements set by decisions of this court can be disregarded on review by the Court of Appeals.

THE CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

(Text Printed in Appendix A)

United States Constitution, Fifth Amendment (infra, p. 17)
United States Constitution, Fourteenth Amendment (infra, p. 17)
Minnesota Constitution, Article I, Section 13 (infra, p. 18)
Minnesota Constitution, Article I, Section 7 (infra, p. 18)
Minnesota Statutes, Sec. 360.012, Subdivision 2 (infra, p. 18)
Ordinance No. 13346 of the City of St. Paul (infra, pp. 18-29)

STATEMENT OF THE CASE

Petitioners are the owners of a valuable tract of land, consisting of two city blocks in downtown St. Paul, lying between the Mississippi River and a public park, commonly called Kellogg Boulevard Park. With the exception of petitioner's river front property, the park is essentially surrounded by property on which high-rise construction is permitted (R. 365).

Petitioner was embarked on a program to sell non-essential and characteristically blighted railroad property. Since the St. Paul property is located near the center of the city and no city zoning plan existed which restricted its use, it was considered an excellent site for commercial urban development. Its highest and best use would be for high grade residential

development. (R. 171, 181) and the trial court so found (R. 378). As such, the property was valued at $320,000 (R. 380). When the St. Paul City Council learned that the contemplated sale would probably result in high-rise construction, it reacted. On September 3, 1964, the Council adopted, in principle (R. 124), a prohibition of any structure whatever on petitioners' land above the level of the Park (R. 122-124; 363), interrogatory No. 8 (R. 42) and answer thereto (R. 43). Two years later, on September 20, 1966, the City Council enacted a formal ordinance to this effect (R. 28-39) singling out petitioners' property alone (R. 365). Subject to this restriction, the property is worth only $150,000 (R. 380); so that the direct loss from this enactment is $170,000. No provision for compensation, in any form or in any amount, has been made or is intended by the City (R. 380).

The City claims the right, under its police power, to condemn the air space over the property in this manner without compensation. Two District Court judges held that the enactment constituted a taking for which compensation must be provided under both the United States and Minnesota Constitutions (R. 20-21, 375, 381). The Court of Appeals, by its majority opinion and the judgment for which a review is sought, reversed. It held that the owner, because the ordinance was "reasonable," was not entitled to any compensation (R. Vol. II, pp. 8, 13; infra pp. 45, 50). The dissenting opinion by Judge Mehaffy found that the petitioners are entitled to constitutional protection. Petitioners applied for a rehearing (R. Vol. II, p. 41) and also filed a Suggestion, under Rule 35 of the Federal rules of Appellate Procedure, for a rehearing in banc (R. Vol. II, p. 45). Three judges dissenting, Chief Judge Van Oosterhout, Judges Blackmun and Mehaffy, the Suggestion for a rehearing in banc was denied on June 12,

1969 (R. Vol. II, p. 47), followed by a denial of the petition for rehearing on June 16, 1969 (R. Vol. II, p. 48). This was followed, on July 2, 1969, with a supplemental opinion denying a rehearing (R. Vol. II, pp. 50-54; infra, pp. 78-81). Judge Mehaffy again dissented (R. Vol. II, p. 53; infra p. 81).

Although the ordinance, in its preamble, recites that it is for the purpose of promoting "public health, safety, order, convenience, prosperity and general welfare," no substantive evidence was presented to support any such recital and the District Court found that the ordinance did not, in fact, promote any of these factors to any appreciable extent (R. 380-381). The District Court also found that the ordinance was an instance of spot zoning (R. 379, 381), and constituted a confiscation of property without compensation (R. 381; infra p. 36). The Court of Appeals does not claim, in its majority opinion, that this finding in any way lacks evidentiary support; neither does it deny that the passage of this ordinance, if enforced, constitutes a taking of property without compensation. The court simply ignores the subject in its entirety.

The Court of Appeals, in its majority opinion, rests its view, in sustaining the ordinance, upon the proposition that it is a "reasonable" enactment and is in furtherance of the public welfare. Although noting that the owners had from the beginning urged the constitutional issues, both state and federal (R. 7), the court, in effect, subordinates the constitutional issue to the determination of reasonableness. The court then defers this determination to the City Council. The result is that the City Council, having decided that its own ordinance is reasonable, acts as sole arbiter of a question of constitutional law. The incantations of the magical words of police power and reasonable zoning by the Council thus lock the door of the United States District Court to the petitioner and anyone similarly situated.

The question here is one of national importance. There are, throughout the United States, hundreds of old cities built on the banks of rivers. Property along those rivers, in many instances, is depreciated by age, deterioration and changing economic conditions. Restricting the use of this property by placing height restrictions on new construction precludes rehabilitation of these waterfront properties. Unless the cities purchase this property, or private parties are permitted to convert it to modern urban use, it will remain a blight. Unreasonable restrictions on property inhibit alienability and place the dead hand of the past on cities striving to be reborn. Unused and blighted railroad property can provide a new source of deperately needed urban property. If it is permanently subjected to arbitrary zoning restrictions, it will remain unused and unsightly.

Title 42 U.S.C. § 1441 *et seq.*, provides a comprehensive program of loans and grants to clear slums and rehabilitate urban blight. It includes provisions for funds to build parks and buy air-rights. There is implicit in this law the congressional intent that the cities may act to rehabilitate old urban areas and provide the opportunity for new construction. The act, in fact, seeks to encourage the type of development that the City of St. Paul has sought to thwart. Paramount in this legislation is the desire to provide urban housing and at the same time to inhibit urban sprawl. Discriminatory height restrictions effectively bar the application of this federal policy.

REASONS FOR GRANTING THE WRIT

1. The majority opinion is in direct conflict with the decisions of this court in

United States v. Causby, 328 U.S. 256, 66 S. Ct. 1062 (1946)

Griggs v. County of Allegheny, 369 U.S. 84, 82 S. Ct. 531 (1962)

Jankovich v. Indiana Toll Road Commission, 379 U.S. 487, 85 S. Ct. 493 (1965)

Village of Euclid v. Ambler, 272 U.S. 365, 47 S. Ct. 114 (1926)

Nectow v. City of Cambridge, 277 U.S. 183, 48 S. Ct. 447 (1928)

In both the *Griggs* and *Causby* cases, this court held that usable air space over private property cannot be taken except by due process and with just compensation to the owner. These cases involved flight paths above private property. This court found that, although the paths used by aircraft were above any structures or trees on the property, the use of this airspace for a public purpose constituted the taking of an easement. The court in *Causby* noted that this easement of flight, if permanent, was equivalent to a fee interest. Thus, a taking of such an easement required compensation to the owner to the extent that the utility of his property is diminished. It was critical to these decisions that the easement taken materially interfered with the enjoyment and use of the property. Justice Douglas in *Causby* stated:

> "* * * that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere." (328 U.S. at 264)

It is apparent that this court has recognized that, although property is subject to many restrictions, there is a zone of air rights immediately above all property which is indispensible to its use and enjoyment. It is so necessary that it cannot be taken for public use even though the owner would leave it vacant. In *Causby*, the court stated:

> "The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. The fact that he does not occupy it in a physical sense by the erection of buildings and the like is not material." (328 U.S. at 264)

Similarly, the *Jankovich* case supports the proposition that the zoning power cannot justify the taking of an easement of flight.* *Jankovich* let stand a decision of the Indiana Supreme Court which found that a zoning ordinance which limited the height of construction on defendant's property to 18 feet constituted a taking which required compensation. The ordinance had sought to limit building heights in order to provide a glide path for aircraft.

Jankovich bears some striking similarities to the facts in this case. Here the city of of St. Paul has sought, by ordinance, to limit the height of construction on petitioners property to no higher than the ground level of adjacent property. The ordinance condemns usable air rights which, under Minnesota law (Sec. 360.012, subd. 2, printed in Appendix A, infra, p. 18), inure to the holder of surface rights, for the sole purpose of extending the view from Kellogg Boulevard Park. Thus, a path of view, created by ordinance, has bisected the air space essential to the use and enjoyment of petitioners

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* In *Jankovich* this court dismissed the Writ of Certiorari as having been improvidently granted. The dismissal was based on the fact that adequate state grounds supported the decision.

property. Subject to this servitude, the utility of petitioners' property has been greatly diminished.

The ordinance has created a scenic easement over petitioners property from the Mississippi River to Kellogg Boulevard Park. This easement allows the spatial expansion of a city park, which could ordinarily have only been acquired by the use of eminent domain or condemnation. The scenic easement deprives the petitioners of the use of the property just as surely as would low-flying aircraft, a bridge expansion or an elevated railway.

The distinction between a valid zoning ordinance and a taking for which compensation is required is often obscure. Here, however, it is clear that the air space condemned as an easement of view has been converted to a public use. This public use constitutes the taking.

> "When private property rights are actually destroyed through the governmental action, then police power rules are usually applicable. . . . But, when private property rights are taken from the individual and are conferred upon the public for public use, eminent domain principles are applicable. . . ." *Ackerman v. Port of Seattle*, 55 Wash. 2d 400, 348 P. 2d 664 at 668, 669, 77 A.L.R. 2d 1344 (1960)

The majority opinion of the Court of Appeals has permitted the city of St. Paul to do what this court has prohibited the United States Army (*Causby*) and the county of Allegheny (*Griggs*) from doing. In those cases, the easement was taken to promote air travel; here it is taken to improve the view. In *Causby* and *Griggs*, vacant air space was taken; here air rights intended to be used in construction have been taken.

Unquestionably, open space and scenery are a necessary component of urban planning. So, too, are schools, streets and

airports, all of which are acquired by the power of eminent domain. Cities cannot expand parks and other public facilities by zoning without compensation. Were this decision to stand, it would stamp with judicial approval a method of condemning property without compensation.

The majority opinion below upheld a zoning ordinance on a concept of reasonableness that is contrary to the constitutional test prescribed by this court. The decision can be summarized as follows:

(a) Neither state nor federal constitutional provisions bar the enactment of a zoning ordinance pursuant to an exercise of the police power;

(b) Whether the police power is valid is a question of reasonableness; and

(c) Reasonableness is not a judicial but legislative function.

The reasoning is perfectly circular. It allows the controlling vote of the City Council to decide not only a legislative question, but a question of constitutional law. In addition, the decision permits reasonableness to supersede the constitutional test prescribed by this court in *Village of Euclid v. Ambler*, 272 U.S. 365, 47 S. Ct. 114 (1926), and *Nectow v. City of Cambridge*, 277 U.S. 183, 48 S. Ct. 447 (1928). Both decisions announced that a zoning ordinance must be reviewed to determine if its "provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." The majority decision has abandoned this test for amorphous standard of reasonableness alone.

The majority opinion is a complete deviation from all previously accepted law. Resting on "reasonableness" alone, it is founded on no existing case law. On the other hand, the

dissent buttressed its position on state and federal cases which speak to the issue. Cases which have decided the question contrary to the majority opinion are numerous.

LaSalle National Bank of Chicago v. City of Chicago, 5 Ill. 2d 344, 125 N.E. 2d 609 (1955)

Piper v. Ekern, 180 Wis. 586, 194 N.W. 159, 34 A.L.R. 32 (1923)

Ackerman v. Port of Seattle, 55 Wash. 2d 500, 348 P. 2d 644, 77 A.L.R. 2d 1344 (1960)

Yara Engineering Corp. v. City of Newark, 132 N.J.L. 370, 40 A. 2d 559 (1945)

Commissioner of Natural Resources v. S. Volpe & Co., 349 Mass. 104, 206 N.E. 2d 666 (1965)

State ex rel. Royal v. City of Columbus, 3 Ohio St. 2d 154, 209 N.E. 2d 405 (1965)

Indiana Toll Road Commission v. Jankovich, 244 Ind. 574, 193 N.E. 2d 237 (1963)

Jackson Municipal Airport Authority v. Evans, 191 So. 2d 126 (Miss. 1966)

It is apparent that if the decision of the Court of Appeals stands, it will raise a serious question for state and federal courts in determining the proper constitutional criteria to be applied in these frequently litigated zoning cases.

2. The majority opinion has decided an important state question in conflict with the applicable state law, as the perspicacious dissenting opinion of Judge Mehaffy (infra, pp. 59-77) so ably indicates. In *Alexander v. City of Minneapolis*, 267 Minn. 155, 125 N.W. 2d 583 (1963), the facts are identical to those here on all important points. There, the City enacted an ordinance limiting buildings on the plaintiff's property to two and a half stories (here it is limited to or below the

ground line). As a result of this ordinance, the plaintiff's property was depreciated in value from $57,000 to $22,000. The Minnesota Supreme Court held the ordinance to be void and unconstitutional for failing to provide compensation for this taking, under *both* the state and federal constitutions. In *Burger v. City of St. Paul*, 241 Minn. 285, 64 N.W. 2d 73 (1954), the court specifically held that, under the Minnesota Constitution, a zoning easement in land is property of which the owner cannot be deprived without just compensation. In four other cases, the enacted restriction was different from that in *Alexander;* but the same constitutional considerations were applied the same way, by the Minnesota court, in *Olsen v. City of Minneapolis*, 263 Minn. 1, 115 N.W. 2d 734 (1962); *Pearce v. Village of Edina*, 263 Minn. 553, 118 N.W. 2d 659 (1962); *Golden v. City of St. Louis Park*, 266 Minn. 46, 122 N.W. 2d 570 (1963); and *Ostrand v. Village of North St. Paul*, 275 Minn. 440, 147 N.W. 2d 571 (1966).

The only attempt by the Court of Appeals to distinguish the *Alexander* and its companion cases to the same effect is the following from the majority opinion (R. Vol. II, p. 13; infra p. 50):

> "We would add that in those four cases, as in those where a contrary result was reached, the Minnesota court made it clear that the test was one of reasonableness."

With due deference to the Court of Appeals, we must inform the court that neither in the *Alexander* case, nor in any of the three other cases has the Minnesota court said anything of the kind. In the *Alexander* case, for example, the only place where the word is even used is when the court is speaking of the *reasonable market value.* In the latest of the cases referred to (*Ostrand v. Village of North St. Paul*, 275 Minn. 440, 147 N.W. 2d 571 (1966)), the Minnesota court took a directly op-

posite view from that assigned to it by the Court of Appeals. There the concluding sentence of the opinion is:

> "We have held that an ordinance of this kind constitutes taking a property without due process contrary to constitutional requirements."

Of course, it has always been held that if an ordinance is *un*reasonable, that fact alone is sufficient to render it void; but no court, until the majority opinion in this case, has ever held that reasonableness of an ordinance, rather than the requirements of the constitution, is the test of its validity; and certainly the Minnesota Supreme Court has never so held.*

In denying the Petition for Rehearing, the majority opinion has cited *Minneapolis - St. Paul Metropolitan Airports Commission v. McCabe*, 271 Minn. 21, 135 N.W. 2d 48 (1965). The court indicates that *McCabe* stands for the proposition that the validity of zoning ordinance under Minnesota law, is determined by reasonableness. Yet the Minnesota court states:

> "Neither is it possible at this time to determine whether the operative effect of an ordinance proposed, but not yet adopted, will be to deprive any person of property without just compensation or will represent an unreasonable exer-

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* *Naegele, Outdoor Advertising Co. v. Minnetonka*, —— Minn. ——. 162 N.W. 2d 206 (1968), is cited by the court below as broadening the scope of zoning regulations under Minnesota law; but it plainly does not change the *Alexander* case nor its companion decisions. The *Naegele* case involved a village ordinance prohibiting all billboards within all areas zoned exclusively for residential use. The ordinance was held reasonable and was sustained. *Naegele* is inapplicable here. It is based on a comprehensive zoning plan, whereas petitioners' property alone is affected by the ordinance in question. Antibillboard laws merely limit the type of structure which can be erected, unlike a height restriction which prohibits all use above a certain level (here ground level). Following the *Naegele* case, the Minnesota Supreme Court again affirmed, as it had done several times before, the rule of the *Alexander* case. *Sanderson v. City of Willmar*, (Nov. 1, 1968) —— Minn. ——, 162 N.W. 2d 494.

cise of the police power", 271 Minn. at 34 (Citing *Jankovich v. Indiana Toll Road Commission*, supra)

It is clear that the Minnesota Court recognized that essential determination in a zoning case is whether there is a taking without compensation as the Indiana Supreme Court found in Jankovich and as the District Court found here.

By refusing to apply the controlling Minnesota law and adopting an independent standard based on reasonableness, the majority has clearly disregarded the mandate of this court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938).

3. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision. The majority opinion held that, as a matter of law, the ordinance of the city of St. Paul was reasonable and therefore constitutional. In so doing, the court ignored the findings of the District Court that the ordinance:

(a) bore no substantial relationship to health, safety, morals or the general welfare;

(b) was an instance of spot zoning and not part of a comprehensive plan; and

(c) was a confiscation without compensation in that the benefit to the public was small in comparison to the detriment of the property owner. (R. 381; infra p. 36)

Federal Rules of Civil Procedure 52(a) provides that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness." It is apparent from the majority opinion that it has deliberately disregarded the facts on which the District Court based its opinion. (R. Vol. II, p. 8; infra p. 45)

It is essential in a case of this kind that the trial court make extensive factual determinations, as did the lower court here. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, at 395 (1926), and in *Nectow v. City of Cambridge*, 277 U.S. 183, at 188 (1928), this court stated that a zoning ordinance will be sustained unless its "provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." This constitutional test can only be applied after a finding of fact by the trial court.

District Court findings of fact have always provided the basis for Appellate review in zoning cases. *McMahon v. City of Dubuque*, 255 F. 2d 154 (8th Cir., 1958), cert. denied 358 U.S. 833 (1958); *Hazen v. Hawley*, 86 F. 2d 217 (D.C. Cir., 1936), cert. denied 299 U.S. 613 (1936); *Leventhal v. District of Columbia*, 100 F. 2d 94 (D.C. Cir., 1938). The same is true of trial court findings in Minnesota *Pearce v. Village of Edina*, 263 Minn. 553, 118 N.W. 2d 659.

Judged against the background of these authorities, the majority opinion can be characterized as an aberration. It violates a Rule of Federal Procedure by disregarding a finding of fact which is required by this court.

4. The majority opinion is in conflict with the decisions of another Court of Appeals. The District Court found that since the ordinance of the city of St. Paul isolated petitioners' property for height restrictions, it constituted invalid spot zoning.* The effect of the reversal by the Court of Appeals

* The fact that this is a case of "spot zoning" is indirectly, and probbly unconsciously, noted by the majority opinion when it states correctly, that only the petitioner appeared before the city council opposing the ordinance. (R. Vol. II, p. ——; infra ——). This is necessarily so, since only petitioners property is affected by it (R. 365). A valid zoning restriction must operate uniformly upon all persons similarly situated within the particular district. (*Pearce vs. Edina, supra*) which this one certainly does not do.

is to hold that spot zoning is constitutionally permissible. The Court of Appeals for the District of Columbia has held otherwise. In *Hazen v. Hawley*, 86 F. 2d 217 (D.C. Cir., 1936), cert. denied 299 U.S. 613 (1936), and *Wolpe v. Poretsky*, 154 F. 2d 330 (D.C. Cir., 1946), cert. denied 329 U.S. 724 (1946), that court upheld the District Court decisions which found that spot zoning constituted an arbitrary and unreasonable exercise of the policepower which bore no relation to the public welfare.

CONCLUSION

Considering all the authorities to the contrary, the decision below can be seen as clearly erroneous. It is therefore respectfully suggested that this may be an appropriate case for this court to invoke its power of summary disposition and accordingly reverse.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted and the judgment below should be summarily reversed.

Respectfully submitted,

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APPENDIX A

THE CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

UNITED STATES CONSTITUTION

Amendment V:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war and public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself; nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

Amendment XIV, Section 1:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

MINNESOTA CONSTITUTION

Article I, Section 7:

Due process; prosecutions; second jeopardy; self-incrimination; bail; habeas corpus. Sec. 7. No person shall be held to answer for a criminal offense without due process of law, and no person for the same offense shall be put twice in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law. All persons shall before conviction be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended unless when in case of rebellion or invasion the public safety may require.

Article I, Section 13:

Private property for public use. Sec. 13. Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured.

Minnesota Statutes, Section 360.012, Subdivision 2:

Subd. 2. The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in subdivision 3.

ST. PAUL CITY ORDINANCE NO. 13346.

Council File No. 230015—Ordinance No. 13346—By Victor J. Tedesco—

An ordinance amending Ordinance No. 7103, approved July 2, 1929, amending Ordinance No. 5840, approved July 6, 1922, entitled,

"An ordinance for the purpose of promoting the public health, safety, order, convenience, prosperity and general welfare by providing for the classification, regulation and restric-

tion of the location of trades and industries and of buildings used for human habitation and for specified purposes and the height and bulk of buildings hereafter erected or altered; and regulating and determining the minimum size of lot line courts and other open spaces and establishing the boundaries of districts for said purposes."

Section 1

That for the purpose of promoting the public health, safety, order, convenience, prosperity, and general welfare of said City and its inhabitants and the regulation of the location, size, use, height, site arrangements of buildings, and density of population therein and the accomplishment of said purpose, it has become necessary to amend the Zoning Code, Chapters 60 to 64, of the Saint Paul Legislative Code, to the end that the same shall include express provisions therefor and effectively regulate and limit the height and bulk of buildings and structures hereinafter constructed or altered within that certain portion of said Height District III and within that certain portion of said Height District IV, established and shown on said zoning map created as a part of the Ordinance No. 5840, approved July 6, 1922, which portion of said Height District III, to be amended, is bound by the following described lines:

Commencing at a point which constitutes the intersection of the westerly line of Saint Peter Street with the southerly line of Height District IV established by the City of Saint Paul Building Zone Ordinance number 5840 and shown on the zoning map thereby made a part of said ordinance, as enacted; thence easterly from said point along said southerly line of said Height District IV to the point of intersection of the same with the westerly line of Height District II established by said ordinance

and shown on said zoning map; thence southerly along said west line of said Height District II produced from said last mentioned point to the intersection of the same with the U. S. Harbor Line as the same is established adjacent to the commonly designated east bank of the Mississippi River. Thence westerly (or upstream) along said established U. S. Harbor Line from said last mentioned point to the point of intersection of the same with the west line of Saint Peter Street produced; thence in a northerly direction along said westerly line of Saint Peter Street produced to the point of beginning.

In the several particulars hereinafter set forth; and which portion of said Height District IV, to be amended, is bound by the following described lines:

All that triangular portion of Height District IV established by Saint Paul Building Zone Ordinance No. 5840 and shown on the zoning map made a part of said ordinance, as enacted, which is bounded on the north by the center line of Kellogg Boulevard; on the east by a westerly line of Height District II established by said ordinance and shown on said zoning map produced from the center line of Kellogg Boulevard to the intersection of said westerly line of said Height District II with the said southerly line of said Height District IV; on the south and west by said southerly line of Height District IV, as said southerly line of Height District IV is extended from the intersection of the same with said westerly line of said Height District II westerly to the intersection of the same with the center line of Kellogg Boulevard at or adjacent to the west line of Wabasha Street produced across Kellogg Boulevard.

In the several particulars hereinafter set forth.

Section 2

Sections 1, 2, and 4 of Ordinance Number 7103, approved July 2, 1929, and Sections 61.04 and 61.05 of the Saint Paul Legislative Code are hereby repealed.

Section 3

The Zoning Code provisions of Chapter 61 of the Saint Paul Legislative Code, Section 61.04, be and hereby are amended to read as follows:

61.04 Height District III

(a) There shall be no restrictions as to the height to which any building or structure may be erected or altered in Height District III except in respect to any building or structure which may be erected in that portion of said Height District III which lies within the following described boundary lines:

Commencing at a point which constitutes the intersection of the westerly line of Saint Peter Street with the the southerly line of Height District IV established by the City of Saint Paul Building Zone Ordinance Number 5840 and shown on the zoning map thereby made a part of said ordinance, as enacted; thence easterly from said point along said southerly line of said Height District IV to the point of intersection of the same with the westerly line of Height District II established by said ordinance and shown on said zoning map; thence southerly along said west line of said Height District II produced from said last mentioned point to the intersection of the same with the U. S. Harbor Line as the same is established adjacent

to the commonly designated east bank of the Mississippi River. Thence westerly (or upstream) along said established U. S. Harbor Line from said last mentioned point to the point of intersection of the same with the west line of Saint Peter Street produced; thence in a northerly direction along said westerly line of Saint Peter Street produced to the point of beginning.

Section 4

The Zoning Code provisions of Chapter 61 of the Saint Paul Legislative Code be and the same are hereby amended by the insertion therein immediately following Section 61.04(a) as set out in Section 3 of this ordinance the following additional section:

(b) That for the specification and application of the hereinafter prescribed and imposed regulations and limitations on the height and bulk of buildings and structures which may be erected or altered therein, said part of said Height District III within said hereinabove described boundary lines of the same hereby is divided into four separate and hereby established sections.

(1) Section 1, Height District III, shall consist of all that part of the same which lies west of the west line of Cedar Street as said line of Cedar Street is produced from the north to the south boundary line of the afore-described part of Height District III.

(2) Section 2, Height District III, shall consist of all that part of the same which lies east of said west line of Cedar Street produced as aforesaid and west of the west line of Minnesota Street produced from the north to the south boundary line of the afore-described part of Height District III.

(3) Section 3, Height District III, shall consist of all that part of the same which lies east of the west line of Minnesota Street produced as aforesaid and west of the center line of Robert Street produced from the north to the south boundary line of the afore-described part of Height District III.

(4) Section 4, Height District III, shall consist of all that part of the same which lies east of the said line of Robert Street produced as aforesaid and west of the west line of Height District II produced from the north to the south boundary line of the afore-described part of Height District III.

Section 5

The Zoning Code provisions of Chapter 61 of the Saint Paul Legislative Code be and the same hereby are amended by the insertion therein immediately following Section 61.04 (b) as set out in Section 4 of this ordinance the following additional section:

(c) That in the various sections of Height District III described above no building, structure, or part of any building or structure, shall be erected or altered except in conformity with the regulations herein prescribed for said established sections of said Height District III.

(1) Section 1, Height District III

In Section 1, Height District III, no building or structure shall be erected or altered to a height in excess of Elevation 90, City of Saint Paul datum.

(2) Section 2, Height District III

In Section 2, Height District III, no building or structure shall be erected or altered to a height in excess of Elevation 75, City of Saint Paul datum.

(3) Section 3, Height District III

In Section 3, Height District III, no building or structure shall be erected or altered to a height in excess of Elevation 60, City of Saint Paul datum.

(4) Section 4, Height District III

In Section 4, Height District III, no building or structure shall be erected or altered to a height in excess of Elevation 45, City of Saint Paul datum.

Section 6

The Zoning Code provisions of Chapter 61 of the Saint Paul Legislative Code, Section 61.05, be and hereby are amended to read as follows:

61.05 Height District IV

(a) There shall be no restrictions as to the height to which any building or structure may be erected or altered in Height District IV, except in respect to any building or structure which may be erected or altered in that portion of said Height District IV which lies within the following described boundary lines:

All that triangular portion of Height District IV established by Saint Paul Building Zone Ordinance Number 5840 and shown on the zoning map made a part of said ordinance, as enacted, which is bounded on the north by the center line of Kellogg Boulevard; on the east by a westerly line of Height District II established by said ordinance and shown on said zoning map produced from the center line of Kellogg Boulevard to the intersection of said westerly line of said Height District II with the said southerly line of said Height District IV on the south and west by said southerly line of Height District IV is extended from

the intersection of the same with said westerly line of said Height District II westerly to the intersection of the same with the center line of Kellogg Boulevard at or adjacent to the west line of Wabasha Street produced across Kellogg Boulevard.

Section 7

The Zoning Code provisions of Chapter 61 of the Saint Paul Legislative Code be and the same hereby are amended by the insertion therein immediately following Section 61.05 (a) as set out in Section 6 of this ordinance the following additional section:

(b) That for the specification and application of the herein prescribed and imposed regulations and limitations on the height and bulk of buildings and structures which may be erected or altered therein, said part of Height District IV within said herein-described boundary lines of the same is hereby divided into four separate and hereby established sections.

(1) Section 1, Height District IV, shall consist of all that part of the same which lies west of the west line of Cedar Street as said line of Cedar Street is produced from the north to the south boundary line of the afore-described part of Height District IV.

(2) Section 2, Height District IV, shall consist of all that part of the same which lies east of said west line of Cedar Street produced as aforesaid and west of the west line of Minnesota Street produced from the north to the south boundary line of the afore-described part of Height District IV.

(3) Section 3, Height District IV, shall consist of all that part of the same which lies east of the west line

of Minnesota Street produced as aforesaid and west of the center line of Robert Street produced from the north to the south boundary line of the afore-described part of Height District IV.

(4) Section 4, Height District IV, shall consist of all that part of the same which lies east of the center line of Robert Street produced as aforesaid and west of the west line of Height District II produced from the north to the south boundary line of the afore-described part of Height District IV.

Section 8

The Zoning Code provisions of Chapter 61 of the Saint Paul Legislative Code be and the same hereby are amended by the insertion therein immediately following Section 61.05 (b) as set out in Section 7 of this ordinance the following additional section:

(c) That in the various sections of Height District IV described above no building structure, or part of any building or structure shall be erected or altered except in conformity with the regulations herein prescribed for said established sections of said Height District IV.

(1) Section 1, Height District IV

In Section 1, Height District IV, no building or structure shall be erected or altered to a height in excess of Elevation 90, City of Saint Paul datum.

(2) Section 2, Height District IV

In Section 2, Height District IV, no building or structure shall be erected or altered to a height in excess of Elevation 75, City of Saint Paul datum.

(3) Section 3, Height District IV

In Section 3, Height District IV, no building or

structure shall be erected or altered to a height in excess of Elevation 60, City of Saint Paul datum.

(4) Section 4, Height District IV

In Section 4, Height District IV, no building or structure shall be erected or altered to a height in excess of Elevation 45, City of Saint Paul datum.

Section 9

The Zoning Code provisions of Chapter 61 of the Saint Paul Legislative Code be and the same hereby are amended by the insertion therein immediately following Section 61.06, the following additional section:

61.07 Saint Paul City Datum

Elevation 90, Elevation 75, Elevation 60, and Elevation 45. City of Saint Paul datum herein specified shall be deemed to signify respectively 90 feet, 75 feet, 60 feet, and 45 feet above Elevation 0, City of Saint Paul datum. The Water Table incorporated in the southeast corner of the present City Hall and Court House Building for the purpose of the application of said restrictions on the height of any such building or structure shall be deemed to represent Elevation 98.597 City of Saint Paul datum or 98.597 feet above Elevation 0, City of Saint Paul datum and to constitute an elevation of approximately 4 feet in excess of the elevation of the paved surface of the intersection of Kellogg Boulevard and Wabasha Street as in existence as of the effective date of this ordinance.

Section 10

That the zoning map which constitutes a part of said Zoning Code be amended in respect of its Height Districts to

show and designate thereon Sections 1, 2, 3 and 4 of Height District III and Sections 1, 2, 3 and 4 of Height District IV, which are established by this ordinance and no building or structure or part of any building or structure shall be erected or altered except in conformity with the regulations prescribed in this amendatory ordinance for said established sections of Height District III and Height District IV.

Section 11

The Zoning map which constitutes a part of the Zoning Code of the City of Saint Paul be and hereby is amended in respect of its key height provisions so that as the same applied to Height District III and Height District IV respectively the provision "No Restrictions" be revised to read "No restrictions save for part restricted by Chapter 61, as amended."

Section 12

The Zoning Code provisions of Chapter 61 of the Saint Paul Legislative Code be and the same hereby are amended by the insertion therein immediately following Section 61.07 as set out in Section 9 of this ordinance, the following section:

61.08 That neither Section 63.13 of the Saint Paul Legislative Code nor any provisions of the same shall in any manner or degree be deemed to have any application to the erection of any building or structure or part of any building or structure in Sections 1, 2, 3 and 4, Height District III, or Sections 1, 2, 3, and 4, Height District IV.

Section 13

Sections 3, 4, 5, 6, 7, 8, 9 and 12 of this ordinance shall be deemed a part of the Saint Paul Legislative Code and shall be

incorporated therein and given the approriate chapter and/or, section numbers at the time of the next revision and printing of said Legislative Code.

Section 14

This ordinance shall take effect and be in force thirty (30) days after its passage, approval and publication.

Passed by the Council September 20, 1966.

Yeas—Councilmen Carlson, Dalglish, Holland, Meredith, Tedesco, Mr. President (Byrne)—6.

Nays—0.

Approved September 20, 1966.

THOMAS R. BYRNE,
Mayor.

Attest:

HARRY E. MARSHALL,
City Clerk.

(September 24, 1966)

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

CHICAGO, ST. PAUL, MINNEAPOLIS and OMAHA RAILWAY COMPANY, and CHICAGO and NORTH WESTERN RAILWAY COMPANY,

Plaintiffs,

vs.

CITY OF SAINT PAUL, a municipal corporation,

Defendant.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER FOR JUDGMENT.

No. 3-66-156 Civ.

Stringer, Donnelly and Sharood, By Philip Stringer and R. Paul Sharood, E-903 First National Bank Building, St. Paul, Minnesota, Attorneys for Plaintiffs;

Honorable Joseph P. Summers, Corporation Counsel for City of Saint Paul, By Jon R. Duckstad, City Hall and Courthouse, St. Paul, Minnesota, Attorneys for Defendant.

The above entitled matter came duly on for trial before the undersigned, one of the Judges of this Court, without a jury, on the 27th day of June, 1967. Upon the admissions of the parties, the evidence received and upon due consideration, the Court makes the following

FINDINGS OF FACT

1. During all times herein mentioned plaintiffs were and are each a corporation duly organized to do business as common carriers by railroad in the State of Minnesota. Each of plaintiffs was and is incorporated in and by the State of Wisconsin; the principal place of business of each of plaintiffs is in the City of Chicago and State of Illinois; and each plaintiff is a citizen of both the States of Wisconsin and Illinois. Defendant is a municipal corporation located in and incorporated under the laws of and a citizen of the State of Minnesota. This action is wholly between the citizens of different states and the matter in controversy exceeds the sum or value of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs.

2. This is a civil action wherein the matter in controversy exceeds the sum or value of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs, and arises under the Constitution of the United States, namely the Fifth and Fourteenth Amendments thereto, and was originally brought for declaratory relief under the provisions of 28 U.S.C., §§ 2201 and 2202.

The Court has jurisdiction both because of the federal question involved and because of diversity of citizenship.

3. During all times herein mentioned, plaintiff Chicago, St. Paul, Minneapolis and Omaha Railway Company was the owner in fee, and plaintiff Chicago and North Western

Railway Company the lessee, of the premises in the City of St. Paul described as follows:

> All of blocks 36, 37, 38 and 39, St. Paul proper, together with those parts of Cedar Street and Minnesota Street lying between the same, and lying south of the south line of Second Street in the City of St. Paul, vacated by resolution of the Council of the City of St. Paul, adopted August 1, 1917 and of record in the office of the Register of Deeds within and for Ramsey County, Minnesota, in Book "77" of Miscellaneous, page 232, except the surface rights over such portion of said Block 36 as is described in that certain resolution of the council of said City, adopted January 24, 1928, and of record in the office of said Register of Deeds, in Book "39" of plans, page 46, condemning and appropriating such surface rights upon the same for public purposes, and subject to a sewer license to the City of St. Paul, dated April 13, 1937, and an easement for public sewer adopted by said Council, on June 24, 1936, and of record in the office of said Register of Deeds, in Book "49", of plans, page 41, all according to the plat of St. Paul proper, on file and of record in the office of said Register of Deeds.

The lease between the plaintiffs was made on December 31, 1956 under authority from the Interstate Commerce Commission.

Ownership of the premises was and is subject also to the reservations in the City of St. Paul to lay water mains, pipes, conduits, and sites for bridge piers in the portions of the premises within the parts of vacated Cedar and Minnesota Streets, and subject to certain outstanding leases to the St.

Paul Dispatch and Pioneer Press, to Farwell, Ozmun, Kirk & Co. and to Northern States Power Company in certain parts or portions of the said premises. The parts of the tract so described above as are not actually used by plaintiffs for railroad purposes are herein referred to as the "subject property" and comprise an area of approximately 102,000 square feet.

4. The subject property abuts upon, and has the legal right of access to Second Street and Kellogg Boulevard or Parkway on the north, Jackson Street on the east, Wabasha Street on the west, and the railroad tracks of plaintiffs on the south. It is located at an elevation considerably below that of Kellogg Boulevard, immediately below which is an abrupt cliff. Second Street is set into this cliff, descending from the level of Kellogg Boulevard at the west to the level of the subject property at its eastern end.

5. In about the year 1960, plaintiffs undertook to attempt the sale of the subject property, and, as a part of the development thereof for sale, interested a number of prospective buyers in the possible purchase thereof. The highest and best potential use of the subject property then was and still is for purposes of a motel, a multiple story apartment house or a series of houses, to start at, or about at the ground line of the subject property as it now lies, and to extend up to and for a considerable distance above the level of Kellogg Boulevard. Construction of such a series of structures would be feasible from the structural standpoint and would be economically sound.

6. Up until September, 1964, there were no restrictions, applicable to the subject property, which would impair the right of owners of the subject property to erect such structures rising to heights many stories above the level of Kellogg Boulevard, as might be desired; but on September 3, 1964, the

City Council of the City of St. Paul by a resolution then adopted proceeded to adopt, in principle, a height restriction whereby no structure of any kind would be permitted to be erected on the subject property to a height rising above the level of Kellogg Boulevard to any extent whatever; and directing the Corporation Counsel of the defendant City to draft a formal ordinance to that effect and submit the same to the Council for formal adoption. Thereupon and thereafter, and because thereof, it became impossible for plaintiffs to interest any prospective buyers in the subject property in its purchase at anything like its worth for the highest and best use to which it was and is adaptable.

7. This action was begun by the filing of the complaint herein on May 20, 1966, when the ordinance so to be drafted and adopted had not been presented; but its restrictive effect upon any sale of the subject property was, for all practical purposes, as great as if it had been enacted formally. By order of this Court dated August 31, 1966, a motion of defendant to dismiss this action was denied; and on September 20, 1966, the City Council of defendant city proceeded to adopt formally, Ordinance No. 13346.

8. Ordinance No. 13346 actually applies only to the subject property. By its terms, not only is any structure prohibited on the subject property which rises above the level of Kellogg Boulevard, but any structure is forbidden which reaches within 17 feet thereof in some locations, and less in others. The properties of other owners lying immediately to the north, to the west and to the east of the subject property are not subject to any such restrictions; in fact, there already are existing on them several structures extending many stories above that level, and more structures of this kind are being planned. The passage of Ordinance No. 13346 is a clear case of spot zoning,

singling out this particular property as the object of its restrictions.

9. Notwithstanding the recitals in its preamble, Ordinance No. 13346 was not passed, nor is it effective to any appreciable extent in the promotion of public health, safety, order, convenience, prosperity or general welfare of the defendant city or its inhabitants; but, on the contrary, the sole and only basis for the enactment of Ordinance No. 13346 was to enhance the view of the Mississippi River and the river valley from Kellogg Boulevard and the multi-storied buildings built or to be built on the northerly side of Kellogg Boulevard and to upgrade the beautification and recreational features of the Kellogg Boulevard park. These are purely aesthetic purposes, and constitute the primary, if not the sole, motive for the enactment of this ordinance.

10. If unrestricted by a height limit ordinance such as ordinance No. 13346, the fair and reasonable value of the subject property on September 20, 1966, the date of its passage by the City Council of the defendant city, was $320,000.00.

11. When restricted by a height limit ordinance such as Ordinance No. 13346, the fair and reasonable value of the subject property on September 20, 1966, the date of its passage by the City Council of defendant city was $150,000.00.

12. The ordinance provides no compensation for the taking of the air rights or for any method of ascertaining proper compensation.

13. The plaintiffs' proposed uses would not create any unreasonable fire or traffic hazards or dangers to public health. In this respect the problems created are not any different than those created by any other tall building in the City of St. Paul.

CONCLUSIONS OF LAW

I.

The Court finds that this zoning ordinance is unreasonable and arbitrary and, therefore, not a valid exercise of the police power based on the following considerations—

(a) The ordinance bears no substantial relation to public health, safety, morals or general welfare but is for aesthetic reasons only. It is designed merely to improve the appearance of the area and thereby increase the aesthetic value of the surrounding businesses, the public park and the public thoroughfare.

(b) The ordinance is an instance of spot zoning and not a part of a comprehensive, well-considered plan. The result is to confiscate valuable property rights and make this property subservient to the surrounding property.

(c) The ordinance is, in effect, a confiscation without compensation since the gain to the public is small compared to the damage inflicted on the owners of the property.

The ordinance is, therefore, unconstitutional as violative of due process of law and enforcement is hereby enjoined.

II.

Since it is clear that this was a good faith attempt by the city to exercise its police power and since there is no demonstration that there will be any future improper interference with the plaintiffs' property rights, the Court does not at this time award damages and thus, in effect, turn this action into an eminent domain proceeding.

III.

The City is not liable for damages for enforcement of the ordinance previous to this action, during which period the or-

dinance was presumptively valid. In addition, the Court feels that any damages would be minimal, speculative and uncertain.

IV.

The Court will retain jurisdiction for the purpose of granting any further relief which might become necessary and proper under 28 U.S.C. § 2202.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 19th day of September, 1967.

MILES W. LORD
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 19,151

City of St. Paul, a Municipal Corporation,

Appellant,

v.

Chicago, St. Paul, Minneapolis and Omaha Railway Company, and Chicago and Northwestern Railway Company,

Appellees.

Appeal from the United States District Court for the District of Minnesota.

May 6, 1969.

Before Matthes, Mehaffy and Heaney, Circuit Judges.

Heaney, Circuit Judge.

The City of St. Paul appeals from a judgment enjoining the enforcement of an amendatory zoning ordinance restricting building heights in a downtown river front area and adjudging the rezoning unconstitutional.

The rezoned area includes a city park which stretches more than three blocks along the edge of a sharp bluff overlooking the Mississippi River and Valley. The appellees' property lies from forty to ninety feet below the surface of the park at the foot of the bluff and is separated from the Mississippi River by railroad tracks and a waterfront street.[1]

The ordinance imposed height restrictions which effectively prohibit the erection of building on the appellees' property which would rise above the level of the park and the adjacent bluff.[2]

The city park and the appellees' property lies largely between the Wabasha Street and Robert Street bridges which cross the Mississippi River and serve as the gateways to the downtown area from the south. The park was established in 1930 and serves to open up the southern approach to the core area which lies immediately to the north of the park.[3] It

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[1] See Appendixes I, II and III.

[2] In 1922, as part of a general zoning ordinance, the appellees' property was subjected to a height restriction of one hundred feet. Property on top of the bluff was restricted to a height of one hundred and fifty feet. In 1929, the height restrictions were removed and the appellees' property has not been subject to restrictions until the present ordinance was enacted. There is no evidence indicating that either the city or the railroads considered high rise construction on appellee's property before the 1960's.

[3] An appellee witness testified with respect to the considerations that went into the establishment of the park in the 1930's. "St. Paul was going to be progressive. We were going places and we did with a 29 million dollar bond issue: built a new court house, [and streets to improve traffic on the north side of the Loop.] I can't give you the thinking of the men that made all the decisions in those days, but I would assume [that the park location was chosen] because of its scenic value, and the outlook over the river and the fact that it was just a delightful place to be."

further serves as a passive recreational area for residents, shoppers, visitors and an estimated 23,000 to 25,000 downtown employees.

In the early 1960's, the St. Paul Housing and Redevelopment Authority undertook planning for the renewal and redevelopment of the downtown core area with the cooperation of other public agencies and private interests. The plan was formally adopted in 1964. A similar task was undertaken by the City Planning Department as a part of an effort to develop a comprehensive plan for the entire city. The downtown portion of the comprehensive plan was adopted in March of 1963, and the plan as a whole in April, 1963. Both the renewal plan and the comprehensive plan envisioned that the park would remain and that no structures would be built on the railroads' property which would rise above the level of the park.

The area immediately north of the zoned areas has undergone the contemplated intensive redevelopment. The Hilton Hotel, Degree of Honor, Y.W.C.A. and Federal Courts buildings have been erected in the last few years. Block J has been cleared for the construction of a high rise apartment building. Further north in the core area, the Osborn, Northwestern National Bank and Farm Credit Bank buildings have been completed and more construction is contemplated.

At about the time that the public agencies began their planning, the railroads[4] started a program of disposing of its nonoperating property throughout its system. The manager of the Real Estate Department of the railroad contacted a number of parties, beginning in the Spring of 1961, in an effort

[4] The Chicago, St. Paul, Minneapolis and Omaha Railway Company is the owner in fee of the property. On December 31, 1956, under authority from the Interstate Commerce Commission, the property was leased to the Chicago and Northwestern Railway Company. For convenience, the appellees will be occasionally referred to as the "railroads."

to stimulate interest in the subject property. He testified that publicity in the Fall of 1963, regarding the possible imposition of height restrictions on the property, dampened the sales effort. In late 1963, the railroads received an offer to purchase about one-half of the property, *i.e.*, the land at the Wabasha Street end, for $4.00 per square foot. It was subject to the condition that the premises not be zoned so as to prohibit the construction of structures above the existing grade of the park. The management of the railroads rejected the offer on the basis that the property was needed for the railroad's operating purposes. At least two other potential purchasers of the property, who did not intend to build above the level of the park, indicated an interest but made no firm offers.

A consulting firm was engaged by the railroads in February, 1966, two months prior to trial, with a view toward a determination of the highest and best use of the property. The railroads' only interest was to sell the property. The study indicated that the highest and best use would be to construct a motel and four high rise apartments which would rise from ten to twenty-two stories above the park.[5] This use would give the apartment occupants the benefit of the light and view over the river valley but, in so doing, would equally deprive others of these benefits. It would also result in the closing off the "front door" of the core area from the southern approaches. The study envisioned building on the property

[5] The appellees' study demonstrating the highest and best use of the property calls for the construction of a motel and four apartment buildings containing 600 apartment units on 102,000 square feet. Under the St. Paul Zoning Code, Chapters 16 through 64, the appellees could not have constructed the 600 apartments without obtaining a variance. It requires 544,200 square feet of land. If the appellees devoted the entire 102,000 square feet to apartments, less than 125 units could be constructed under the Code provisions. The granting of a variance is discretionary and the decision to grant or deny one cannot be reversed in the absence of a clear abuse of that discretion. *State v. Gunderson*, 198 Minn. 51, 268 N.W. 850, 851 (1936).

originally deemed necessary for operating purposes. A witness for the railroads testified that the problem had been resolved and the property was available.

Although the record is not clear, the city, in the Fall of 1963, apparently first became aware that the railroads were attempting to sell the river bottom property for the possible construction of buildings that would rise above the park level.

A number of municipal authorities and boards, including the Housing and Redevelopment Authority, the Planning Boards and the Zoning Board recommended the imposition of height restrictions. The action of the Planning Board was taken after a public hearing. The resolution passed by that Board recited that the rezoning was reasonably related to existing land uses, overall needs of the community and the planning for future land use.

On September 3, 1964, the City Council, after a public hearing at which the railroads were the sole voice in opposition, unanimously approved an ordinance restricting height in the questioned area and directed the corporation counsel to draft such an ordinance. The City Council formally adopted the ordinance on September 20, 1966.

In May of 1966, the appellees brought suit for a declaratory judgment and asked that the proposed ordinance be declared void and unconstitutional.[6] Following the formal en-

[6] The appellees (plaintiffs below) began this action by filing a complaint on May 20, 1966, praying for a declaratory judgment. At that time, the subject ordinance had not been informally adopted but the adoption of the ordinance in principle on September 3, 1964, had the effect of restraining the sale of the subject property. The District Court, on August 31, 1964, denied the appellant's (defendant below) motion to dismiss the action for failure to state a claim and lack of jurisdiction. The court held that while no jurisdiction existed to declare unconstitutional any ordinance which might impose height restrictions on the subject property in the future, the complaint presented an actual controversy with respect to the ordinance adopted in principle. The City Council, on September 20, 1966, formally adopted the ordinance we consider here and the appellees amended their complaint accordingly.

actment of the ordinance, the appellees filed a supplemental complaint and asked that the enforcement of the ordinance be enjoined or, in the alternative, money damages be awarded.

The District Court found that the fair value of the property prior to the passage of the ordinance was $320,000, and that its after value was $150,000. There is substantial evidence in the record to support this finding.

The court also found that the ordinance was unreasonable and arbitrary and, therefore, not a valid exercise of the police power because: (1) it bore no substantial relationship to health, safety, morals or the general welfare, and was enacted for aesthetic reasons only; (2) it was an instance of spot zoning and not part of a comprehensive plan; and (3) it was a confiscation without compensation in that the benefit to the public was small in comparison to the detriment of the property owner. The court concluded that the ordinance was "unconstitutional as violative to due process of law." It enjoined enforcement of the ordinance.

The court held that the appellees were not entitled to damages for enforcement of the ordinance during the pendency of the action as any damages during the period were minimal and speculative.

> "Since it is clear that this was a good faith attempt by the city to exercise its police power and since there is no demonstration that there will be any further improper interference with the plaintiffs' property rights, the Court does not at this time award damages and thus, in effect, turn this action into an eminent domain proceeding."

It retained jurisdiction for the purpose of granting any further relief which might become necessary and proper under 28 U.S.C. § 2202. We reverse.

The appellees concede that the city's purpose is a public one. They acknowledge that the city can accomplish its objective by the proper exercise of its eminent domain power—compensating the railroads for the damage to their property. They argue, however, that the ordinance is violative of the Fifth Amendment to the United States Constitution and Article 1, Section 13 of the Minnesota Constitution in that it takes the railroads' property without compensation.[7]

Neither constitutional provision interposes a barrier to the imposition of restrictions on the use of private property if a zoning ordinance is enacted pursuant to a valid exercise of the police power. *Goldblatt v. Town of Hemstead*, 369 U.S. 590, 593 (1962);[8] *City of Marysville v. Standard Oil Co.*, 27 F. 2d 478 (8th Cir. 1928), *aff'd, Standard Oil Co. v. Marysville*, 279 U.S. 582 (1929); *Kiges v. City of St. Paul*, 240 Minn. 522, 62 N.W.2d 363, 369-70 (1953); *State ex rel. Berry v. Houghton*, 164 Minn. 146, 204 N.W. 569 (1925), *aff'd mem.*, 273 U.S. 671

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[7] The Fifth Amendment to the United States Constitution provides part: "* * * nor shall private property be taken for public use without just compensation." Article 1, Section 13 of the Minnesota Constitution provides: "Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured."

The appellees argue that the Minnesota provision imposes a stricter standard than that under the federal provision. Because we believe that the ordinance does not violate the Minnesota Constitution as it has been interpreted by the Supreme Court of Minnesota, we express no opinion on whether a more stringent standard exists.

[8] "'* * * The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public is not—and, consistently with the existence and safety of organized society cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.'"
Goldblatt v. Town of Hempstead, 369 U.S. 590, 593 (1962).

(1927).[9] The test of whether the enactment falls within that power is one of reasonableness.

The zoning ordinance will be sustained unless its "* * * provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). *Gorieb v. Fox*, 274 U.S. 603, 608-609 (1927); *Mc Mahon v. City of Dubuque, Iowa*, 255 F. 2d 154, 158-59 (8th Cir.), *cert. denied*, 358 U.S. 833 (1958); *Naegele Outdoor Adv. Co. v. Village of Minnetonka*, . . . Minn. . . . , 162 N.W.2d 206, 212 (1968); *State ex rel. Howard v. Village of Roseville*, 244 Minn. 343, 70 N.W. 2d 404, 407 (1955).

In reviewing the trial court's determination of invalidity, we examine the record not to see whether its findings are supported by evidence but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis. *South Carolina State H. Dept. v. Barnwell Bros.*, 303 U.S. 177, 191-92 (1938); *Weinberg v. Northern Pac. Ry. Co.*, 150 F. 2d 645, 648 (8th Cir. 1945).

Fairly debatable questions as to the reasonableness, wisdom and propriety of an ordinance are not for the determination of the courts but for that of the legislative body on which rests

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[9] "The public use, which sustains the taking of property under the power of eminent domain upon compensation paid, differs from the public interest or welfare which justifies the restriction of the individual in the use of his property without compensation, in consideration of the public interest and common welfare of the community. * * *

* * * * * *

"Zoning statutes are becoming common. The police power, in its nature indefinable, and quickly responsive, in the interest of common welfare, to changing conditions, authorizes various restrictions upon the use of private property as social and economic changes come. A restriction, which years ago would have been intolerable, and would have been thought an unconstitutional restriction of the owner's use of his property, is accepted now without a thought that it invades a private right. As social relations become more complex, restrictions on individual rights become more common." *State ex rel. Berry v. Houghton*, 164 Minn. 146, 204 N.W. 569, 569-70 (1925), *aff'd mem.*, 273 U.S. 671 (1927).

the duty and responsibility of the decision. *Standard Oil Co. v. Marysville, supra; Naegele Outdoor Adv. Co. v. Village of Minnetonka*, 162 N.W.2d at 209.

The mere fact that the ordinance seriously depreciates the value of the complainants' property is not enough to establish its invalidity. *Goldblatt v. Town of Hempstead, supra* at 593; [10] *American Wood Products Co. v. City of Minneapolis*, 21 F.2d 440, 444 (D. Minn. 1927) (J. Sanborn), *aff'd*, 35 F.2d 657 (8th Cir. 1929); *Kiges v. City of St. Paul*, 62 N.W.2d at 369. Nor can it be invalidated on the grounds that aesthetic considerations will be furthered if it is permitted to stand. *Berman v. Parker*, 348 U.S. 26 (1954); [11] *Naegele Outdoor Adv. Co. v. Village of Minnetonka, supra*; [12] *State ex rel. Twin*

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[10] This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation. *Pennsylvania Coal Co. v. Mahon*, 260 US 393 * * *. There is no set formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant, see *Pennsylvania Coal Co. v. Mahon* (US) supra, it is by no means conclusive, see *Hadacheck v. Sebastian*, 239 US 394 * * *, where a diminution of value from $800,000 to $60,000 was upheld. * * *."
Goldblatt v. Town of Hempstead, supra at 594.

[11] "* * * The concept of the public welfare is broad and inclusive. * * * The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."
Berman v. Parker, 348 U.S. 26, 33 (1954).

[12] "* * * *The mere fact that the adoption of a zoning ordinance reflects a desire to achieve aesthetic ends should not invalidate an otherwise valid ordinance. Thus, if the challenged restriction is reasonably related to promoting the general welfare of the community or any other legitimate police power objective, the fact that aesthetic considerations were a significant factor in motivating its adoption cannot justify holding it unconstitutional. * * *." (Citations omitted.)
Naegele Outdoor Adv. Co. v. Village of Minnetonka, —— Minn. ——, 162 N.W. 2d 206, 212 (1968).

City Bldg. & Inv. Co. v. Houghton, 144 Minn. 1, 176 N.W. 159, 162 (1920).[13]

An examination of the entire record in the light of the above standards convinces us that the trial court erred in substituting its judgment for that of the City Council.[14] In so holding, we note that the city's answers to the railroads' interrogatories were vague, conclusionary, unresponsive and not in accordance with Rule 33, Federal Rules of Civil Procedure. If these answers reflected accurately the sum of the Council's reasons for enacting the ordinance, we would have no alternative but to hold that they were inadequate.[15] The record indicates, however, that the Council's action was preceded by studies and recommendations of other municipal agencies; and, that reports of these studies were communicated to the

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[13] "* * * *It is time that courts recognize the aesthetic as a factor in life. Beauty and fitness enhance values in public and private structures."
State ex rel. Twin City Bldg. & Inv. Co. v. Houghton, 144 Minn. 1, 176 N.W. 159, 162 (1920).

[14] The trial court found that the traffic and fire protection problems which could be created by the construction of high rise buildings on appellees' property were not unreasonable and were an insufficient basis on which to sustain the ordinance. We place primary reliance on other factors in sustaining the ordinance.

[15] "Interrogatory Number 9: 'How and in what manner and to what extent does Ordinance No. 13346 promote public health.' Answer: 'Unable to answer specifically.'
"Interrogatory number 10: 'How and in what manner and to what extent does Ordinance No. 13346 promote public safety.' Answer: 'Unable to answer specifically.'
"Interrogatory number 11: 'How, in what manner and to what extent does Ordinance No. 13346 promote public order.' Answer: 'Unable to answer specifically.'
"Interrogatory number 12: 'How, in what manner, and to what extent does Ordinance No. 13346 promote public convenience.' Answer: 'Unable to answer specifically.'
"Interrogatory number 13: 'How, in what manner and to what extent does Ordinance No. 13346 promote public prosperity.' Answer: 'Unable to answer specifically.'
"Interrogatory number 14: 'How, in what manner and to what extent does Ordinance No. 13346 promote general welfare.' Answer: 'Promotes the general welfare in a general way.' "

Council. It also shows that the Council conducted a public hearing before passing the ordinance. From a reading of the record, it is fair to say that as a result of the reports and recommendations it received from the public agencies, the Council had before it most of the evidence developed at trial before the District Court including the following:

(1) The passage of the ordinance was preceded by studies and favorable recommendations of the Housing and Redevelopment Authority, the Planning Board (after a public hearing) and the Zoning Board. These recommendations were communicated to the City Council. *American Wood Products Co. v. City of Minneapolis, supra* at 444. See, *Ostrand v. Village of North St. Paul*, 275 Minn. 440, 147 N.W. 2d 571, 573 (1967).

(2) The City Council held a public hearing prior to the adoption of the ordinance. The Housing and Redevelopment Authority, the Planning Board, the Metropolitan Improvement Committee, the Y.W.C.A., the St. Paul Automobile Club and the Downtown Department of the Chamber of Commerce appeared at the hearing and submitted their views as to why the ordinance should be adopted.

(3) Mr. B. Warner Shippee, the former director of the Housing and Redevelopment Authority, testified at trial that the downtown renewal project had three objectives:

> "First, the economic improvement of the city and the central business district. Secondly, its physical improvement; and thirdly, in the course of doing this the removal of blight, deleterious structures and influences of economic disuse in the area."

Mr. Shippee further testified that when the Authority undertook the renewal project, it acted on the assumption "that the area in front of the mall would be kept clear of obstructions—

that [the] park would remain and provide sort of a front door for the Capitol Center downtown project as well as generally the central business district." He added that the subject area was directly related to the renewal project and that the Authority felt that high rise construction could have an adverse effect on property values and the renewal project.

> "* * * The Authority actually took cognizance of this problem in a meeting of June 11, 1964, * * *."
>
> [T]he authority commissioners after discussing the matter moved unanimously that it was their opinion that the ordinance [restricting height] was feasible and in the best interest of the community. The discussion had related to the relationship of the ordinance to the Capitol Center Downtown Renewal project. * * *."

(4) Dr. Noland Heiden, City Planner for the City of St. Paul, quoted from the comprehensive city plan as follows:

> "'A sixth land use area of the central business district can be called the "south Kellogg" area and will remain largely as it now exists. It is composed of the blocks along the edge of the river bluff south of Kellogg Boulevard and presently contains industrial office operations * * *. The major proposal is to extend the Kellogg Mall one block up to the east to the post office. This would more fully open up the "front porch" of the central business district and provide necessary land for street improvements designed to facilitate access to the central business district from Warner Road.'"

(5) Appellees' witnesses conceded that the property values on the north side of Kellogg Boulevard would be diminished by the erection of high rise building on the appellees' property

which would partially obstruct the view of the river valley.[16] See, *State v. Wieland*, 69 Wis. 262, 69 N.W. 2d 217, 222, *cert. denied*, 350 U.S. 841 1955)

No evidence was offered at trial to show: that the ordinance was designed to restrict competition, compare, *Pearce v. Village of Edina*, 263 Minn. 553, 118 N.W.2d 659, 671, n. 1 (1962); or that the railroads acquired the property with the expectation that it would be used in the manner they now seek, compare, *Alexander v. City of Minneapolis*, 267 Minn. 155, 125 N.W.2d 583, 585 (1963); or that the railroads cannot continue to use their property as they have in the past.

In our view, the appellees' reliance on *Ostrand v. Village of North St. Paul, supra; Alexander v. City of Minneapolis, supra; Pearce v. Village of Edina, supra; and Olsen v. City of Minneapolis*, 263 Minn. 1, 115 N.W.2d 734 (1962), is misplaced. While there is language in each opinion supporting the appellees' position—that an amendatory zoning ordinance designed to protect aesthetic values and resulting in the diminution of the market values of the complainants' property is invalid—that language must be viewed in the light of the facts in those cases. Those factual situations were significantly different from the one presented here. We would add that in those four cases, as in those where a contrary result was reached, the Minnesota Court made it clear that the test is one of reasonableness.

We are convinced that were this case presented to the Minnesota Supreme Court, it would hold that the determination of the City Council—that the ordinance was reasonably related

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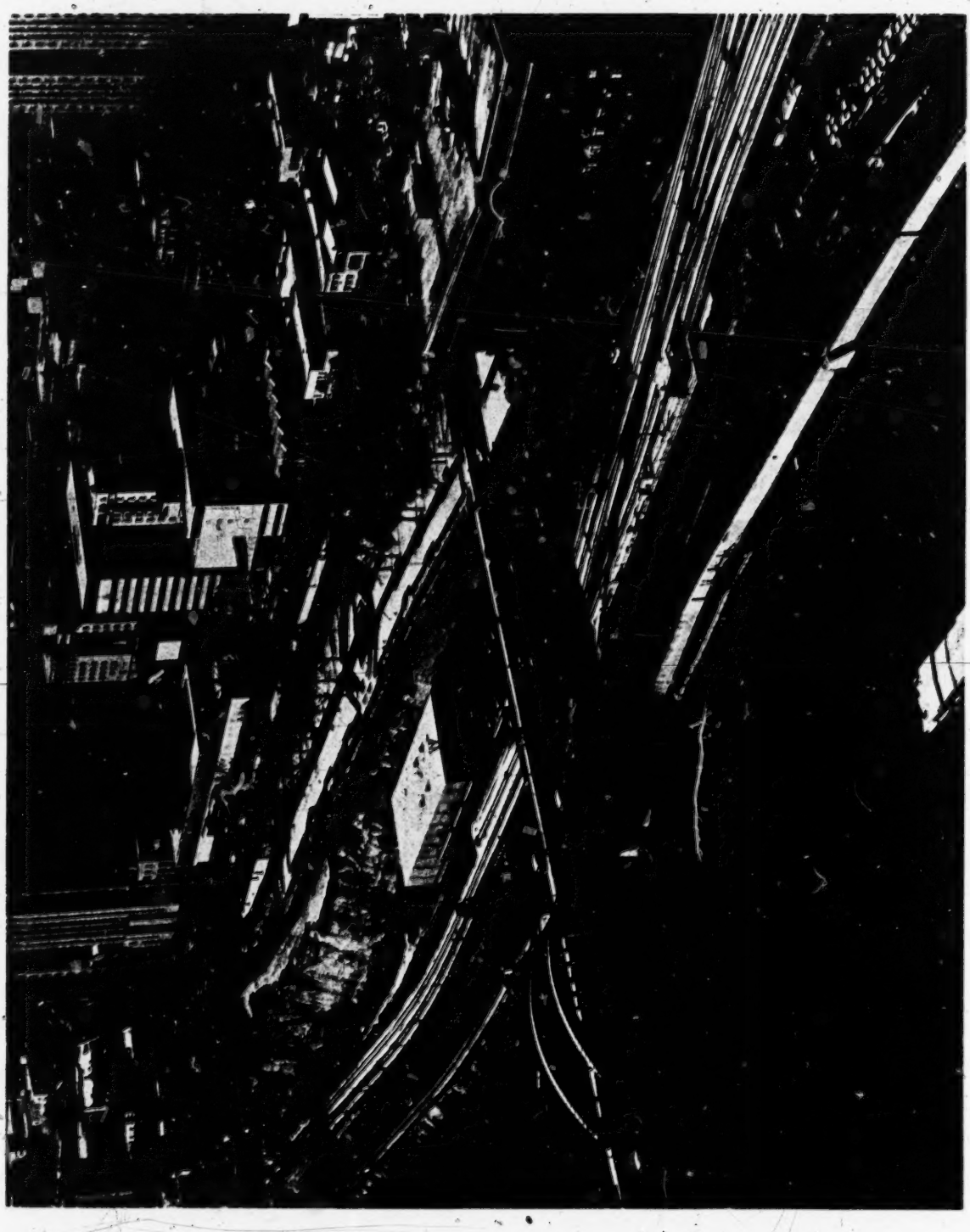
[16] Mr. Rohland H. Thomssen, Executive Vice President of the Clapp-Thomssen Company of St. Paul, a leading real estate firm in the city, and Mr. Stanley Miller, Vice President of the Real Estate Research Corporation, a real estate consulting firm employed by the railroads, testified that the value of properties on the north side of Kellogg Boulevard would be diminished by high rise construction on appellees' property.

to the protection of public welfare—would be permitted to stand. In our view, the action of the City Council was based "on reason and logic and not on whim and caprice." It promoted a legitimate police power objective—the renewal of the core area of Downtown St. Paul so as to be a desirable place in which to work, shop, live and enjoy cultural and recreational activities. The benefit to the public in preserving these values was great in comparison to the diminution in market values suffered by the appellees.

Reversed.

APPENDIX I

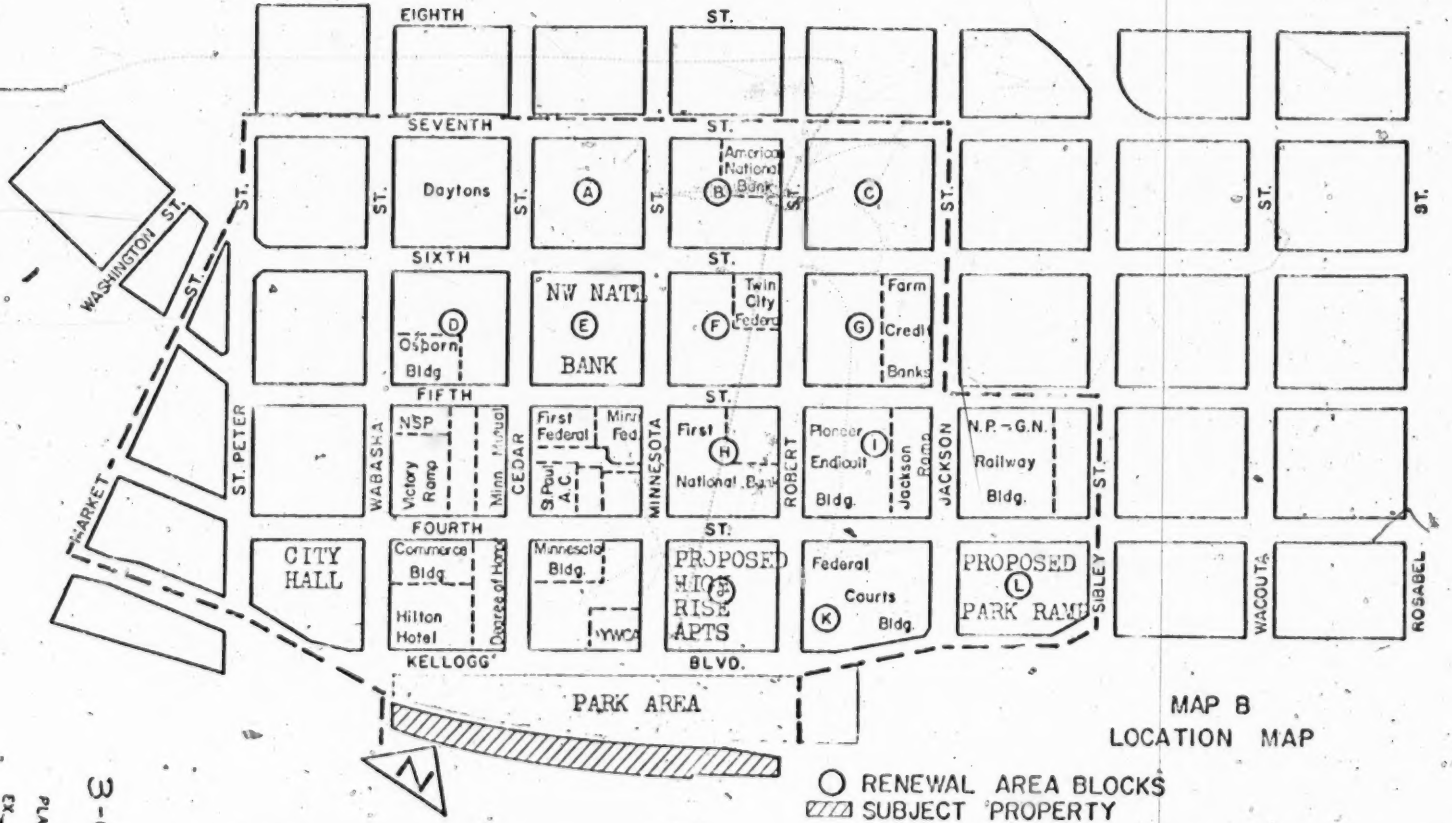
Plaintiff's Exhibit 1.



MAP A
DOWNTOWN
ST. PAUL AREA
APPENDIX II

3-66-151 Civil
delineated by this court
PLAINTIFFS
EX. 18
D. C. BREVIU, Repr.

REAL ESTATE RESEARCH CORPORATION



MAP B
LOCATION MAP

○ RENEWAL AREA BLOCKS
▨ SUBJECT PROPERTY

Park area has been delineated by this court along with indicating the location of some of the recent construction.

REAL ESTATE RESEARCH CORPORATION

PLAINTIFFS EX 5 D. C. Minn. Rev

3-72-152 Civ.

APPENDIX III

Mehaffy, Circuit Judge, dissenting.

I respectfully dissent primarily because the opinion of the majority condones a discriminatory taking of valuable property rights without compensation in plain derogation of the Fifth Amendment to the federal Constitution as well as the broader provisions of the Constitution of the State of Minnesota. Subsidiarily, yet importantly, I am of the view that the majority opinion falls in error by ignoring the findings of fact of the trial court, thus setting up this reviewing court as a trier of facts, a function never condoned by the Supreme Court, this Court, or any other court of which I have knowledge.

The majority opinion is erroneously based first on the mistaken assumption that there is no "taking" of appellees' property, and hence no violation of the mandate of the Fifth Amendment that ". . . nor shall private property be taken for public use, without just compensation," and Article 1, § 13 of the Minnesota Constitution which provides that "private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured." The Supreme Court has long and consistently held that governmental restrictions can so diminish the value of property as to constitute a taking. In *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958), the Court said:

> "Traditionally, we have treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case. . . . *In doing so, we have recognized that action in the form of regulation can so diminish the value of property as to constitute a taking.* (Emphasis supplied.)"

It is not arguable but that a taking is effected in this case by the restrictive ordinance. The railroad undeniably incurred substantial damage to its property by reason of this amendatory, height-restricting ordinance, which in some places forbids the railroad from even building to within seventeen feet of the ground level of the park property. The majority opinion admits there is substantial evidence supporting the court's finding respecting the damage. The Minnesota Supreme Court in *Burger v. City of St. Paul*, 241 Minn. 285, 64 N.W.2d 73 (1954), held that a "taking" included every interference with the ownership, possession and enjoyment of value of private property. The court there said at 64 N.W.2d 77:

> "It is settled law in Minnesota that easements, whether in the nature of a right-of-way, a restrictive covenant, or a negative or equitable easement, are property within the meaning of the Minnesota Constitution and cannot be taken without compensation or be removed by mere zoning under the police power."

Following this quotation, the Minnesota court quotes the applicable state constitutional provision appearing elsewhere in this opinion and also cites several Minnesota cases as well as *United States v. Wheeler Township*, 66 F.2d 977 (8th Cir. 1933).

Alexander v. City of Minneapolis, 267 Minn. 155, 125 N.W.2d 583 (1963), is a case strikingly similar to the one here. There, because of the city's plan to impose a height restriction on proposed construction, it refused to issue a building permit for an apartment building for the reason that the proposed plan would cause the property owner to suffer a substantial diminution in the value of his property without compensation

being paid. The Minnesota court stated at 125 N.W.2d 586, 587:

> "We have recently stated that the enactment of 'spot' zoning ordinances or amendments to comprehensive zoning ordinances under the police power which results in a total destruction or substantial diminution of value of property affected thereby without just compensation therefor constitutes the taking of property without due process. *Olsen v. City of Minneapolis*, 263 Minn. 1, 115 N.W.2d 734; *Pearce v. Village of Edina*, 263 Minn. 553, 118 N.W.2d 659. See, also, *Golden v. City of St. Louis Park*, 266 Minn. 46, 122 N.W.2d 570; *Connor v. Township of Chanhassen*, 249 Minn. 205, 81 N.W.2d 789. Where the motivating basis for such enactments is in furtherance of the esthetic concepts of nearby property owners who are not called upon to make compensation to the owner for any resulting loss or diminution in the value of his property, this would be particularly true."

Additionally, the Minnesota court in *Alexander* quoted the cogent and appropriate language of Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-416 (1922), as follows:

> "'* * * The protection of private property in the Fifth Amendment * * * provides that it shall not be taken for such [public] use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. [Citing cases] When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished

in this way under the Constitution of the United States. "'The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. [Citing cases.] We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.'"

The majority quotes in footnote 11 from *Berman v. Parker*, 348 U.S. 26, 32 (1954), Mr. Justice Douglas' statement: ". . . If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way." However, the majority failed to quote Mr. Justice Douglas; statement in the same opinion on page 36: "The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking."

In the *Berman* case, the Court held that statutes delegating to redevelopment agencies the power of eminent domain are not invalid and that the rights of property owners are protected where they are compensated for the taking of their property. With this approach, *i.e.*, condemnation, I have no quarrel. Neither do appellees nor the Minnesota Supreme Court, which made its position on this question abundantly clear in *Golden v. City of St. Louis Park*, 266 Minn. 46, 122 N.W.2d 570, 577 (1963), where it said:

"While there should be no objection to a municipality's endeavors to apply esthetic considerations to plans for

future development, in doing so it should be aware that where such plans involve destruction or diminution of property rights or interests, just compensation therefor should be paid to the owners whose rights or interests are thus taken for the benefit of the community as a whole."

Supportive to its statement that neither constitutional provision interposes a barrier to the imposition of the restrictions imposed here, the majority cites and relies upon *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *City of Marysville v. Standard Oil Co.*, 27 F.2d 478 (8th Cir. 1928); *aff'd Standard Oil Co. v. Marysville*, 279 U.S. 582 (1929); *Kiges v. City of St. Paul*, 240 Minn. 522, 62 N.W.2d 363 (1953); *State ex rel. Berry V. Houghton*, 164 Minn. 146, 204 N.W. 569 (1925), *aff'd Mem.* 273 U.S. 671 (1927).

The cases cited and relied upon to avoid the constitutional requirement of payment of just compensation are patently inapposite to the facts and the issues in the instant case. *Goldblatt, supra*, involves an ordinance regulating mining within the corporate limits of a town. Specifically, the ordinance provided that "no excavation shall be made below two feet above the maximum ground water level at the site." 369 at 591, n. 1. The contention of one of appellants was that the ordinance would prevent it from continuing in business and thus was the taking of property without due process of law in violation of the Fourteenth Amendment. The property owner (Goldblatt) owned a 38-acre tract within the town limits upon which one of the other appellants was engaged in mining sand and gravel. In describing the situation there, the Court said:

"Before the end of the first year [after mining operations commenced in 1927] the excavation had reached the water table leaving a water-filled crater which had been widened and deepened to a point that it is now a 20-acre lake with an average depth of 25 feet. The town has expanded around this excavation, and today within a radius of 3,500 feet there are more than 2,200 homes and four public schools with a combined enrollment of 4,500 pupils." 369 U.S. at 591.

The Supreme Court noted that "the ordinance in question was passed as a safety measure, and the town is attempting to uphold it on that basis." 369 U.S. at 595. The Court noted also a dearth of relevant evidence upon which it could evaluate the reasonableness of the ordinance and, *inter alia*, the loss which appellants would suffer from the imposition of the regulation. Significant is the following language of Mr. Justice Clark at 369 U.S. at 594:

"How far regulation may go before it becomes a taking we need not now decide, for there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question."

Thus, *Goldblatt, supra,* specifically did not reach the issue which is crucial here.

The next case cited and relied on by the majority is also clearly distinguishable. It is *City of Marysville v. Standard Oil Co., supra,* and, like *Goldblatt,* involved a safety ordinance as distinguished from the usual zoning ordinance. The ordinance required all tanks within the city limits used for storage of petroleum products or other inflammable liquids to be

buried at least three feet underground. Tanks of a capacity of 500 gallons or less, if used for the storage of crude oil, distillate or fuel oil, and less than ten gallons, if used for the storage of gasoline, kerosene or naphtha, were exempt from the requirement. The petitioners, dealers in petroleum products who were licensed under a former ordinance, had maintained for many years two tanks for storage of gasoline and kerosene limits. Petitioners contended that the ordinance was so arbitrary and capricious as applied to them as to constitute a deprivation of their property without due process of law. In upholding the ordinance, the Supreme Court noted that the master found that gasoline and kerosene stored in large quantities are dangerous, inflammable substances, which when ignited are a menace to life and property in the vicinity; that even with the use of most modern safety devices, fires or explosions of such storage tanks occur, and that within the four years preceding the trial five disastrous fires of gasoline storage stations had occurred in Kansas, in two of which gasoline tanks had exploded, in one case striking and burning a building 475 feet away, killing nine people, wounding 26 more, and burning several houses. Additionally, the findings show that within an even smaller radius from petitioners' tanks and in the same or adjacent blocks, there are many buildings including residences, a hotel, warehouses and garages, some of wooden structure, and kerosene storage tanks of 75,000 gallons capacity, and that the principal street of the town is within two blocks of the Standard tank. The Court further observed that the ordinance does not preclude petitioners from locating their storage tanks without the city limits and hence the burden imposed upon them cannot be greater or otherwise more objectionable than that imposed by the forced removal of dangerous or offensive trades or businesses.

It is one thing to ordain for the safety of residents of a city but quite another to single out and take a person's property for esthetic purposes without compliance with the constitutional provisions for just compensation.

The two Minnesota cases relied upon by the majority are not in point and hardly justify a passing word, in light of the more recent cases of the Minnesota court which are in point and which I think are controlling here.

The first of these two cases cited by the majority is *Kiges v. City of St. Paul, supra,* where the court merely held that in a case tried to the court without a jury, when the trial court had found that an amendatory ordinance was within the scope of the city's comprehensive plan, such findings will not be reversed on appeal unless they are "manifestly contrary to the evidence. . . ." The majority in the instant case ignores the findings of the trial court, so it is difficult to comprehend how *Kiges, supra,* is relevant to its conclusion.

The final case cited by the majority on this crucial issue is *State ex rel. Berry v. Houghton, supra.* This was a mandamus suit seeking a permit for a four-family flat prohibited by a comprehensive zoning ordinance, and the Minnesota court held that a fair zoning ordinance resulting in the exclusion of a four-family flat building from a designated residential district is constitutional.

It appears obvious to the writer that the cases relied upon by the majority form too fragile a base to justify a skirting of the constitutional provisions which protect a landowner from a confiscatory taking of substantial property rights without compensation. Moreover, it is singular to note that the majority completely ignores the deliberate and obviously discriminatory "spot" zoning in the instant case, and beyond that the majority opinion is based on a concept that

would only be applicable if constitutional validity is first determined.

The specific premise of the majority opinion rests upon a patently erroneous basis in that it completely overlooks the requirement of constitutionality in its approach to this case. The majority states: "In reviewing the trial court's determination of invalidity, we examine the record not to see whether its findings are supported by evidence but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis," and "fairly debatable questions as to reasonableness, wisdom and propriety of an ordinance are not for the determination of the courts but for that of the legislative body on which rests the duty and responsibility of the decision." There can be no quarrel with the majority's abstract statements, but the premise is valid only if based upon the assumption of absence of constitutional infirmity. It cannot be questioned that under the principle of separation of powers the courts cannot invade the jurisdiction of other departments of government, but it is equally elementary that a city, state, or even the Congress, cannot validly invoke any ordinance or statute regardless of its "reasonableness, wisdom and propriety" if such ordinance or statute violates fundamental provisions of the Constitution. We are dealing here with the power of a municipality—the validity of an amendatory ordinance—not with the rational basis of the ordinance.

The cases relied on for the formation of the erroneous premise upon which the majority opinion rests are inapposite, as will be revealed by close reading of the opinions—and the Supreme Court, this court and every other court of which I have any knowledge support the principle I suggest—that before a city, the state or the national Congress can validly make

a choice, whether under the police power or not, the choice must first be constitutionally valid.

It seems so elementary as to be unnecessary to cite cases to the effect that the doctrine advanced by the majority cannot be invoked if specific constitutional prohibitions are violated. For example, the Supreme Court said in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 215 (1962):

> "In dealing with problems of interpretation and application of federal statutes, we have no power to change deliberate choices of legislative policy that Congress has made *within its constitutional powers.* (Emphasis supplied.)"

The Supreme Court also said in *Polish Alliance v. Labor Board*, 332 U.S. 643, 650 (1944):

> "On the other hand, the old admonition never becomes stale, that this Court is concerned with the bounds of legal power and not with the bounds of wisdom in its exercise by Congress."

This court said in *Review Committee, Venue VII, etc. v. Willey*, 275 F. 2d 264, 271 (8th Cir. 1960):

> "And *'once the question of constitutional power is answered in the affirmative* the wisdom, need and effectiveness of a particular statute enacted in the exercise of that power is a question for the Congress not the courts.' *United States v. Kissinger*, supra, at page 942 of 250 F.2d, *Wickard v. Filburn*, supra, page 129 of 317 U.S., at page 91 of 63 S.Ct. (Emphasis supplied.)"

See also and compare *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966); *Wolff v. Selective Service Local*

Bd. No. 16, 372 F.2d 817 (2nd Cir. 1967); *Hurley v. Reed*, 288 F.2d 844 (D.C. Cir. 1961).

The majority takes as its text extracts from the opinion in *South Carolina State Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177 (1938), but this is an altogether different question from the one presented here. *Barnwell* dealt with a South Carolina statute concerning the weight and width regulations of trucks on its highways so as to conserve the highways and promote safety thereon. The Supreme Court there held that the adoption of the methods used by South Carolina was a legislative and not a judicial choice, but what the majority here overlooks is that the Supreme Court in *Barnwell* was discussing a state statute that did not infringe the Constitution or any national legislation relating to interstate commerce and was not discriminatory. The Supreme Court noted at 303 U.S. 181 at the outset of its opinion that the district court of three judges had ruled that the provisions of the South Carolina statute had not been superseded by the Federal Motor Carrier Act, and "do not violate the Fourteenth Amendment." The Supreme Court also said in *Barnwell*, "when the action of a legislature is within *the scope of its power*, fairly debatable questions are not for determination of the courts, but for the legislative body on which rests the duty and responsibility of decision. (Emphasis supplied.)" 303 U.S. at 190-191. The Court then continues its discussion based on the constitutionality of the statute. Finally, in its conclusional paragraph, the Supreme Court in *Barnwell* said:

> "The legislative measures taken by South Carolina are within its legislative power. *They do not infringe the Fourteenth Amendment*, and the resulting burden on in-

terstate commerce is not forbidden. (Emphasis supplied.)"[1]

The other case cited in the majority opinion in support of its premise is *Weinberg v. Northern Pac. Ry. Co.*, 150 F.2d 645 (8th Cir. 1945), where an extract from *Barnwell* was quoted relating to the examination of the whole record to ascertain whether it is possible to say that the legislative choice is without rational basis, but preceding that statement we note that the court said at page 648:

"It is generally held that if the action of a legislative body is *within the scope of its power*, questions as to the reasonableness, wisdom and propriety of its action, if fairly debatable, are not for the determination of courts, but for the legislative body. (Citing cases.) (Emphasis supplied.)"

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[1] Considering a similar question in *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 523-524 (1959), the Court cited in *Barnwell* case and there said:

"*The power of the State to regulate the use of its highways is broad and pervasive.* We have recognized the peculiarly local nature of *this subject of safety*, and have upheld state statutes applicable alike to interstate and intrastate commerce, despite the fact that they may have an impact on interstate commerce. *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177; *Maurer v. Hamilton*, 309 U.S. 598; *Sproles v. Binford*, 286 U.S. 374. The regulation of highways 'is akin to quarantine measures, game laws, and like local regulations of rivers, harbors, piers, and docks, with respect to which the state has exceptional scope for the exercise of its regulatory power, and which, Congress not acting, have been sustained even though they materially interfere with interstate commerce.' *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 783.

"*These safety measures* carry a strong presumption of validity when challenged in court. If there are alternative ways of solving a problem, we do not sit to determine which of them is best suited to achieve a valid state objective. Policy decisions are for the state legislature, absent federal entry into the field. Unless we can conclude on the whole record that 'the total effect of the law *as a safety measure* in reducing accidents and casualties is so slight or problematical as not to outweigh the natonal interest in keeping interstate commerce free from interferences which seriously impede it' (*Southern Pacific Co. v. Arizona, supra*, pp. 775-776), we must uphold the statute. (Emphasis supplied.)"

It is significant to note also that in *Weinberg* this court found that the findings of the trial judge were sustained by the evidence and affirmed the court's order permanently enjoining the city from the enforcement of its ordinance with respect to the appellee railway company. 150 F.2d at 652. There the court noted that "an ordinance even though not invalid in its entirety may, nevertheless, in operation be found, under existing facts, to be arbitrary and unreasonable, and to that extent may be declared to be inoperative. (Citing cases.)" 150 F.2d at 648.

Spot Zoning. As background material, perhaps it will be helpful to recite some of the undisputed facts leading up to this litigation. For many years, the appellee-owner of the property here involved, Chicago, St. Paul, Minneapolis and Omaha Railway Company (Northwestern Railway Company is lessee), maintained a freight house on the property but the same was retired and the building taken down in 1957. By 1960, said appellee was engaged in a program of disposing of its property that was not required for its operating purposes. In that same year, the subject property was brought to the attention of the real estate department of the appellee-owner as being a non-paying facility. After the usual preliminary work embracing title investigation, etc., appellee instituted an active campaign to sell the subject property. In connection with this campaign, appellee contacted some forty to fifty prospective purchasers. The subject property at the time was zoned for industrial usage and, of course, there was no restriction upon it.

At the time it commenced its campaign to dispose of this property, there was no such thing as the St. Paul Downtown Redevelopment Plan in existence, and when such a plan was adopted it did not embrace the subject property. Mr. B. Warner Shippee, the then executive director of the St. Paul

Housing and Redevelopment Authority, testified relating to the downtown project as follows:

> "Q. Then, could I ask you specifically what, if any, urban planning or development objectives did the Housing Authority have toward the property that's the dispute of this lawsuit; that is, the railroad property below the bluff, Kellogg Mall bluff between Robert Street and Wabasha?
>
> "A. Well, first I have to indicate that this property is not within the urban redevelopment or renewal area of the downtown project, which is a twelve block area."

Mr. Shippee also testified that "the Housing Authority is generally responsible for the housing programs and urban renewal programs in connection with the entire city of St. Paul; and has had both actively going on a series of renewal projects and has contemplated or had been planning a series of additional projects both in and out of the core area." The witness in discussing objections to construction of buildings which would extend into the area above Kellogg Boulevard said that this subject did not come to the attention of the Authority's commissioners until 1964. He testified:

> "The Authority actually took cognizance of this problem in a meeting of June 11, 1964, when the proposed ordinance which has been referred to was brought to their attention by me as executive director."

The Council of the City met on September 3, 1964 and adopted a motion instructing its attorney to prepare an ordinance amending the zoning code to establish height restrictions, but such an ordinance was not adopted until September 20, 1966. This was only after the instant suit had been instituted on May 20, 1966 and after Judge Larson had on

August 31, 1966 denied the city's motion to dismiss the appellees' complaint. The publicity, however, of the earlier council meeting sufficed to chill the interest of any prospective purchaser in the subject property, and it seems apparent that appellees would have been left in this stymied position indefinitely had this suit not been brought.

Actually, this subject was brought to the attention of the city by the appellee-owner's campaign to sell its property, and at least one of the city committees had had a so-called public meeting prior to the one mentioned above, but appellee was given no notice of it and, therefore, was not represented. The first knowledge of the city's threat to impose a height restriction on the subject property was brought to the attention of appellees in 1963.

The amendatory ordinance is directed solely at the subject property and is a classical example of illegal "spot" zoning. The ordinance affects no other property and there have been and are being constructed buildings of great height on all other sides of the park. Property within 100 feet of the subject property was recently condemned by the Housing Authority as "blighted," the owner was paid compensation therefor, and it was sold to private interests as a site for a high rise luxury apartment building. *Housing and Redevelopment Authority of the City of Saint Paul v. Coleman's Service, Inc.*,— Minn.—160 N.W.2d 266 (1968). At the time of this condemnation proceeding, the property there involved was used as a parking lot which is the use to which a portion of the subject property is now being put.

The Minnesota court has repeatedly held that the enactment of "spot" zoning ordinances or amendments to comprehensive zoning ordinances under the police power, which results in a total destruction or substantial diminution of value of property affected thereby without just compensation there-

for, constitutes a taking of property without due process. *Alexander v. City of Minneapolis, supra; Pearce v. Village of Edina*, 263 Minn. 553, 118 N.W.2d 659, 671 (1962), and cases therein cited. In *Golden v. City of St. Louis Park, supra*, the Minnesota Supreme Court said (122 N.W.2d at page 577):

> "Likewise, it should consider evidence relative to authorized uses and classifications of property adjacent to that involved in the proceedings, and where it finds from the evidence that restrictions imposed upon the property involved have not been made applicable to adjacent or nearby tracts within the same zoning classifications, it should not hesitate to determine that the restrictions applied to the property involved are violative of fundamental, constitutional property rights of its owner. *Rowland v. City of Racine*, 223 Wis. 488, 271 N.W. 36; *City of Pleasant Ridge v. Cooper*, 267 Mich. 603, 255 N.W. 371."

For further references concerning spot zoning, see annotation in 51 A.L.R.2d 263, 311 and 58 Am. Jur., *Zoning* § 39.

Findings of Fact. There are many factual resolutions required for a determination of this case such as: the scope of the ordinance; its purpose; its effect on the property involved; its relation to the adjoining property and many more. Only a fact finding tribunal can make such determinations.

Fed. R. Civ. P. 52 (a) provides that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." We applied the "clearly erroneous" rule in the zoning case of *McMahon v. City of Dubuque, Iowa*, 255 F.2d 154, 159 (8th Cir. 1958), *cert. denied*, 358 U.S. 833 (1958), where we affirmed the action of the dis-

trict court upholding the ordinance and there stated: "The findings of the District Court are presumptively correct and the evidence presented in this appeal does not show that they are clearly erroneous." We cited *McMahon* with approval in *Barryhill v. United States*, 300 F.2d 690, 693 (8th Cir. 1962).

More recently, this court, speaking through Judge Van Oosterhout, now Chief Judge, in *Whitson v. Yaffe Iron & Metal Corp.*, 385 F.2d 168, 169 (8th Cir. 1967), said:

> "The clearly erroneous standard applies to appellate review of findings of fact by the trial court in cases tried to the court without a jury. Rule 52 (a) Fed. R. Civ. P.; *Friedman v. Fordyce Concrete, Inc.*, 8 Cir., 362 F.2d 386, 387; *Nelson v. Seaboard Sur. Co.*, 8 Cir., 269 F.2d 882, 886.
>
> "We do not try cases de novo upon appeal. With respect to credibility findings, great weight must be given to the fact that the trial court had an opportunity to observe and hear the witnesses. A finding is clearly erroneous only if it is induced by an erroneous view of the law or if substantial evidentiary support is lacking."

Other Eighth Circuit cases to the same effect include *First National Bank of Clinton v. Julian*, 383 F.2d 329, 333 (8th Cir. 1967); *Commissioner v. Riss*, 374 F.2d 161, 166 (8th Cir. 1967); *Coca-Cola Co. v. C.I.R.*, 369 F.2d 913, 919 (8th Cir. 1966); *Hamm v. C.I.R.*, 325 F.2d 934, 937 (8th Cir. 1963), *cert. denied*, 377 U.S. 993 (1963).

Cases of this type must be considered upon each set of particular facts and the trial court here of necessity made numerous findings of fact which I do not think we are at liberty to ignore in this case under the rule and concept of ascertaining from the whole record whether it is possible to say that the

legislative choice is without rational basis. If we have such authority in the instant case, we are permitted to bypass fundamental constitutional rights, and, furthermore, with this precedent, we certainly would feel privileged to exercise such a rule in many other cases in the future. This would be in disregard of Rule 52 (a), and there would be no end to the employment of such a rule even in situations like we have here that would bring about a circumvention of basic constitutional rights.

Here, it was the trial court's duty to weigh the evidence, determine its credibility and ascertain whether the evidence was supportive of establishing that factors relative to health, safety and public welfare bore a material relationship to the restrictive provisions of the ordinance. *Pearce v. Village of Edina, supra.* Beyond that in the instant case it was the trial court's duty to consider the evidence relating to adjacent property, and the effect, if any, of the ordinance on other and adjacent property with respect to the "spot" zoning issue.

Standard for Review on Doubtful Questions of State Law. While this writer has never been particularly enchanted by it, there nevertheless exists a deeply embedded rule in this circuit to the effect that our standard for review on a doubtful question of state law is to ascertain only whether the trial court has reached a permissible conclusion, and, if so, we will not interfere with it. *General American Life Ins. Co. v. Yarbrough,* 360 F.2d 562, 568 (8th Cir. 1966); *Solomon v. Northwestern State Bank,* 327 F.2d 720, 723 (8th Cir. 1964); *Campbell v. Village of Silver Bay, Minn.,* 315 F.2d 568, 575 (8th Cir. 1963); *St. Paul Hospital & Cas. Co. v. Helsby,* 304 F.2d 758, 759 (8th Cir. 1962).

I do not think a doubtful question of state law exists here. The opinions of the Minnesota Supreme Court we have cited

seem to clearly support the trial court's conclusion. Judge Larson, while not reaching the heart of this case, wrote an extensive memorandum denying the city's motion to dismiss, citing the Minnesota cases of *Pearce v. Village of Edina, supra;* and *Alexander v. City of Minneapolis, supra.* Judge Lord, who heard this case, served as Attorney General of the State of Minnesota, and was experienced in eminent domain proceedings. *See, e.g., State v. Case,* 263 Minn. 47, 115 N.W.2d 749 (1962).

The majority speculates that the Supreme Court of Minnesota would hold as the majority has held, but I do not agree. I think that this case can and should be determined without reaching a federal question, and it is inconceivable to me that the Minnesota court would permit a confiscation of property rights without just compensation. This is particularly so because of the broad provisions of the Minnesota Constitution and its interpretation thereof.

It alarms me that this court would go further in the direction of condoning an arbitrary and unreasonable taking of private property without just compensation than either the United States Supreme Court or the Minnesota Supreme Court. I would affirm the judgment of the district court. Noting that this suit was brought in the alternative, and that the district court has retained jurisdiction, said court if the city prefers, could treat the case as one of eminent domain, and if in the trial court's opinion the ends of justice required it, the court could permit the parties to adduce additional evidence on the damage issue.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19,151

City of St. Paul, a Municipal Corporation,
Appellant,

v.

Chicago, St. Paul, Minneapolis and Omaha Railway Company, and Northwestern Railway Company,
Appellees.

} Petition for Rehearing.

[July 2, 1969.]

Before Matthes, Mehaffy and Heaney, Circuit Judges.

Per Curiam.

The appellees petition for a rehearing on the grounds that *Indiana Toll Road Commission v. Jankovich,* 244 Ind. 574, 193 N.E. 2d 237 (1963), *cert. granted,* 377 U.S. 942 (1964), *cert. dismissed as improvidently granted,* 379 U.S. 487 (1965), a case not cited by either party, is controlling and requires that this Court's decision be set aside. We cannot agree.

In *Jankovich,* the Commission owned a toll road adjacent to an airport and contended that a zoning ordinance regu-

lating the height of the toll road owned by them was invalid under Article 1, Section 21 of the Indiana Constitution, and the Fourteenth Amendment to the United States Constitution. The Supreme Court of Indiana sustained the Commission's contention. The Supreme Court of the United States granted a petition for certiorari but subsequently dismissed it as being improvidently granted. In so doing, the Court said:

> "Needless to say, we express no opinion in this case regarding the validity under the United States Constitution of the city's airport zoning ordinance."

379 U.S. at 496, n. 3.

The Court also stated:

> "* * * The Indiana Supreme Court had before it a case in which the effect of the ordinance was to establish a maximum height of 18 feet for structures on respondent's land. Although it recognized that zoning regulations may be upheld as a reasonable exercise of the police power 'where the owner of property is merely restricted in the use and employment of his property,' 244 Ind.. at 581, 193 N.E. 2d, at 240-241, the court held that a taking requiring compensation—rather than mere regulation—was effected here because 'the City of Gary has attempted, by the passage of the ordinance under consideration, to take and appropriate it to its own use *the ordinarily usable* air space of property adjacent to the Gary Airport. . . .' 244 Ind., at 582, 193 N.E. 2d, at 241. (Emphasis added.) As we read the opinion of the Indiana Supreme Court, it certainly does not portend the wholesale invalidation of all airport zoning laws."

379 U.S. at 493.

The Minnesota Supreme Court considered airport zoning

regulations in *Minneapolis-St. Paul Metropolitan A. Com'n v. McCabe,* 271 Minn. 21, 135 N.W. 2d 48 (1965). The court held that the M.A.C. had authority to promulgate zoning regulations controlling the use of vertical space in "airport hazard areas" lying within twenty-five miles of the City Halls of Minneapolis and St. Paul. It stated:

> "* * * [I]t [is not] possible at this time to determine whether the operative effect of an ordinance proposed, but not yet adopted, will be to deprive any person of property without just compensation or will represent an unreasonable exercise of the police power.[10] [[10] Note, *Jankovich v. Indiana Toll Road Comm.*, 379 U.S. 897, 85 S. Ct. 463, 13 L. Ed. 2d 439.] We cannot anticipate and settle problems which may arise as between M.A.C. and the cities and villages located within its territorial ambit if a zoning ordinance promulgated by one of the legislatively created governmental bodies comes in conflict with an ordinance promulgated by another. For the present, we must assume that the matter will be fully explored at the public hearing contemplated by the statute and that the proposed ordinance will be amended and refined, in so far as necessary, so that in the end only those requirements or restrictions will be imposed which will be reasonably necessary to effectuate the purposes of the enactment as required by §360.066."

Id. at 57.

A rereading of *Jankovich* and *McCabe* strengthens our conviction that the Minnesota Supreme Court will determine the validity of zoning ordinances on the basis of whether the ordinance is a reasonable exercise of the police power. We remain convinced that were it to consider the ordinance passed

by the St. Paul City Council in this case, it would hold that it was enacted pursuant to a valid exercise of that power.

We have also reviewed *United States v. Causby*, 328 U.S. 256 (1946), and *Panhandle E. Pipe Line Co. v. State Highway Com.*, 294 U.S. 613 (1935), and associated decisions. We do not believe they are controlling here. See, Note, Jet Noise in Airport Areas: A National Solution Required, 51 Minn. L. Rev. 1087 (1967) and 31 Minn. L. Rev. 384 (1947).

The petition for rehearing is denied.

Mehaffy, Circuit Judge, dissenting.

I respectfully dissent from the denial of the petition for rehearing primarily for the reasons stated in my dissenting opinion, which basically point up that the majority has failed to come to grips with the controlling question and has thereby reached a conclusion which in my view makes for an important and dangerous precedent proscribed by both the Fifth Amendment to the Federal Constitution and Article 1, § 13 of the Minnesota State Constitution. Simply stated, the sole and determinative question is: Can a municipality by enactment of an ordinance circumvent the plain mandate of the Constitution by the taking of private property without just compensation? The answer has to be "No."

The *Jankovich* case cited in the petition for rehearing and discussed in the majority per curiam opinion, while not dispositive of the crucial issue here, certainly affords no support for the decision reached by the majority. *Jankovich* lets stand a State supreme court decision which holds unconstitutional a height restriction ordinance purporting to authorize appropriation of air space without just compensation. If anything, *Jankovich*, as well as other airport cases, *e.g.*, *Griggs v. Allegheny County*, 369 U.S. 84 (1962), and *United States v. Causby*, 328 U.S. 256 (1946), lends weight to the views expressed in my dissenting opinion.